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Supreme Court of the United States

OCTOBER TERM, 1905.

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JAMES BUCK, TRUSTEE UNDER THE WILL OF JOB M. NASH, DECEASED,
Plaintiff in Error,

v.

WILLIAM E. BEACH, TREASURER OF TIPPECANOE COUNTY, INDIANA,
Defendant in Error.

No. 14.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Brief of Defendant in Error.

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INDEX.

	PAGE.
Constitutional Question Not Involved	58
Findings of Indiana Courts	43
Ohio Notes had Business Situs	102
Pleadings	1
Promissory Notes and Mortgages are Tangible Property.	80
Propositions of Law	48
Questions of Fact, Argument upon	28
Situs, Character of	39
Tax Dodger	24
Taxes Not Paid	20
Temporary Removal of Ohio Notes	96

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Brief of Defendant in Error.

I.

PLEADINGS.

No question arising upon the pleadings in this case is before this Court. Therefore we do not discuss them.

II.

The statement of facts set forth in the brief of plaintiff in error is not a fair statement of the facts in the case.

We therefore, for the information of the Court, submit what we believe to be an accurate statement of the facts found in the record.

Job M. Nash in life was domiciled in and a resident of the State and city of New York. He died testate in the month of July, 1893. His will was probated in Cincinnati, Ohio. By it a trust was created, and William A. Goodman, of Cincinnati, and James Buck, the plaintiff in error in this case, were made trustees of such trust. They qualified and entered upon the duties of their trust. The trust fund consisted of Ohio and Indiana notes and bonds, aggregating $268,000. The Ohio and Indiana notes belonging to said trust were apportioned to plaintiff in error. He held and retained them in the State of Indiana, and was so holding and retaining them at the time this action was begun. During all the years from 1872 to 1893, inclusive, Job M. Nash was the owner of a great sum of money, aggregating something like $750,000, which he kept invested in bonds, stocks, notes and mortgage securities in the States of Indiana and Ohio, which investments were made for him by agents, and the securities so taken were held by said agents.

The principal place of transacting the business of investing said money of said Nash and of keeping and holding said securities was in the city of LaFayette, Indiana, from the year 1872 to 1893, inclusive. At this place an office was maintained by said Nash, where said securities were kept, said investments made, and of which said agent was in charge.

In 1873 Edgar H. Andress, of the firm of Andress & Wood, became the agent of said Nash in said city of La-Fayette. This firm did a general brokerage business; kept an office for the transaction of said business, and kept two safes in which the securities and valuable papers of said Nash were kept. Said Andress acted under a duly executed power of attorney, the essential part of which is as follows:

> "To execute releases of or release on the record, upon full payment thereof, any and all mortgages heretofore executed or that may be hereafter executed to me or transferred to me by assignment, and held by me at the time of payment thereof, and recorded in said county of Tippecanoe, or in any of the other counties of the State of Indiana, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present."

This power of attorney is dated January 9, 1874.

The character of the business carried on by Andress for Nash is told by him:

> "In 1873 the firm of Andress & Wood were doing a general brokerage and insurance business; loaned some money for Nash; looked after little property that he had; principal business loaning money; made our money out of commission from borrower up to March, 1879; office in Coleman

Bank building, LaFayette, Indiana; had power of attorney; retained it until 1881; safe and vault in office; loaned money for Nash; insured his property; looked after and collected rents; looked after tenants and repairs; loaned money for him; collected his interest; all notes and mortgages belonging to Nash were entered on register; made one Cincinnati loan between 1874 and 1879; went from LaFayette to Cincinnati to renew loan.

"We had two safes which belonged to Nash, one small one, one large one; we made loans, collected interest and reinvested principal; made loans whenever we had money enough; we collected rents and sold products; no note ever sold, transferred or pledged in any business in Indiana up to 1882.

"James McCormick knew combination of vault and big safe in 1881; in 1882 gave James Buck combination to small safe; he knew combination to large one. McCormick had power of attorney; Nash paid McCormick; McCormick signed checks 'Job M. Nash, per James Mc.' Buck took charge in 1882, and had charge until Nash's death in 1893. In 1881 McCormick took charge of office; books and papers of Nash kept in safes; had two safes, one burglar proof, one fireproof; Nash's papers, notes and mortgages were kept in burglar-proof safe. He owned quite a number of city lots and farms in 1879."

The extent of the business carried on by Andress for Nash is more accurately shown by the mortgage records of Tippecanoe, Benton, Warren and White Counties, as found in the agreement of counsel in the record in this

cause. The facts shown by the records are more reliable than the memory of Mr. Andress. This agreement as to the facts shown by the mortgage records is found in the record in this cause.

The mortgage records as shown in said agreement disclose that Nash had money loaned on mortgage notes in Warren County as follows:

1872.....	$5,000	1873.....	$6,500
1874.....	6,500	1875.....	6,500
1876.....	6,500	1877.....	6,500
1878.....	5,000	1879.....	5,000
1880.....	2,000	1881.....	1,200

That during said years three mortgages were made to Nash and three mortgages were released.

That he had money loaned on mortgage securities in White County as follows:

1872.....	$2,000	1873.....	$4,100
1874.....	6,100	1875.....	8,376
1876.....	9,576	1877.....	9,576
1878.....	6,576	1879.....	3,700
1880.....	4,400	1881.....	700
1882.....	700		

That during said years seven mortgages were executed upon lands in said county to Nash and seven were released. In the number released were two foreclosures.

In Benton County there was $10,000 loaned on mortgage security during each of the years, 1872, 1873, 1874, 1875 and 1876.

In Tippecanoe County there were mortgage loans for each of said years as follows:

1872....	$ 100	1873....	$ 100
1874....	1,200	1875....	73,500
1876....	91,470	1877....	109,810
1878....	126,787	1879....	112,812
1880....	84,582	1881....	48,972
1882....	29,150		

During these years 116 mortgages were executed and 110 releases were executed and two mortgages were negotiated, sold and assigned.

The total money loaned in the four counties for these years was as follows:

1872....	$ 17,100	1873....	$ 21,600
1874....	23,800	1875....	98,376
1876....	117,546	1877....	125,886
1878....	138,363	1879....	120,512
1880....	90,982	1881....	50,872
1882....	29,850		

All these notes, mortgages and securities were kept by Andress in the safes owned by Nash and kept in the office of Andress & Wood, and were entered on a register kept by said Andress in said office for said purpose.

Andress' agency and authority were revoked February 15, 1881, and James McCormick succeeded him. He acted under a power of attorney, the essential part of which is as follows:

> "To release and discharge of record any and all mortgages which I now hold, when the same shall

be fully paid and satisfied to me. And also if any person shall purchase any note or mortgages held by me, said McCormick is hereby authorized to transfer and assign the said notes or mortgages to such person without recourse on me, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do, if personally present at the doing thereof, hereby ratifying and confirming all that my said attorney shall or may lawfully do or cause to be done by virtue hereof, and I do hereby revoke the power of attorney heretofore executed by me to Edgar H. Andress."

The power of attorney was dated July 15, 1881.

Under this power of attorney McCormick made loans, collected rents, rented farms, sold grain, collected interest on loans, took possession of office fixtures and furniture, including safes, and was paid a salary by Nash. The office was Nash's office, the furniture was Nash's furniture.

August 1, 1882, James Buck, the plaintiff in error in this cause, became the agent of Mr. Nash in LaFayette, Indiana, and as such took charge of and conducted the LaFayette business under a power of attorney dated August 1, 1882, revoking the power of attorney theretofore granted to McCormick, and couched in language identical with the power of attorney granted to McCormick on July 15, 1881, except as to the name of the attorney.

On October 31, 1885, Nash executed to said James Buck a second power of attorney, increasing his authority, and constituting him, for the purpose of taxation at least, the owner of the property and securities in his hands. The essential part of this power of attorney is as follows:

> "To release and discharge of record any mortgage that may have been given, or that may hereafter be given to me, when the same shall be fully paid and satisfied to me. Also if any person or persons shall purchase any notes or mortgages that may have been given or that may hereafter be given to me, said James Buck is authorized to transfer such notes and mortgages, without recourse on me, and to surrender any notes, mortgages or bonds that may be or may have been given to me as collateral security, whenever the obligation to secure which such collateral was or may be given has been fully paid and satisfied to me, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all my said attorney or his substitute may or shall lawfully do or cause to be done by virtue hereof."

In 1881 two mortgages were negotiated, sold and assigned. In 1883 one mortgage was negotiated, sold and assigned. In 1887 one mortgage was negotiated, sold and assigned. These facts are shown by the mortgage records

of Tippecanoe County, Indiana, and are found in the agreement as to the Tippecanoe County mortgages as shown by the mortgage records of said county.

The following facts are shown by the evidence of James Buck:

Buck began looking after farms in 1879; succeeded McCormick in August, 1882; under power of attorney; succeeded to office; office furniture, fixtures and business; received enlarged authority by power of attorney number two in October, 1885, and continued to act thereunder until Nash's death in the summer of 1893; began looking after farms in 1879, and continued until 1882; rented his farms; collected rents; sold what grain there was on them and paid money into the hands of McCormick.

Came to city in 1883; had authority to check on bank funds; employed by month; office in Coleman Bank building; in 1882 McCormick became sick; Nash said he wanted some one he could trust in his office in LaFayette; was much worried; some one who could keep accounts, receive money, collect rents and keep books. After we made arrangement he took me to bank and told them I had privilege of drawing checks; said he wasn't loaning any money, was closing up his business; papers, books, notes and mortgages in safe when office was turned over to me with the property in it in 1882; I understood they were turning over to me the property and office of Job M. Nash. Books were personal account of Nash, cash account, bank account, account against each piece of property and list of loans in Indiana.

The following from Mr. Buck's testimony discloses the circumstances under which he was employed:

> "When Mr. Nash discovered the condition Mr. McCormick was in he was a good deal put out because he thought a great deal of Mr. McCormick, and he said he didn't know what he would do for a man in his office, that he didn't know of anybody he would trust with his business, and I said to him to take his time, that it was not necessary for him to hurry, that I would take charge of his office until he could find some one. 'Well,' but he says, 'you can't keep my books; can't keep my accounts.' 'Yes,' I said, 'I can keep any books.' He seemed surprised. Then he began to talk to me about hiring me. The result was he employed me by the month and I continued for the same compensation during all the time of my employment, $100 per month."

Insurance policies, farm leases, leases on city property, books, notes and mortgages in safe in 1882 when Buck took charge of LaFayette office.

After 1887, Buck testifies, he made loans on his own responsibility. Goodman was loaning a good deal of money for Nash in Cincinnati for six per cent. Buck told Nash he had a number of good loans offering at seven per cent., and that it was not good business to loan money at Cincinnati at six when he could get seven for it here on just as good security. Nash told Buck he could loan what money he could safely put out at seven per cent.

This in brief is the testimony of Mr. Buck as to the character and extent of the LaFayette business. The

mortgage records, however, of Tippecanoe and Benton Counties are more reliable than the memory of Mr. Buck, and the facts shown by these records are set out in the record of this cause in an agreement between plaintiff in error and defendant in error.

The above agreement discloses that the following amounts were loaned in Benton County on mortgage security for the following years, to wit:

1884.....	$ 5,000	1885.....	$ 5,000
1886.....	39,000	1887.....	39,000
1888.....	39,000	1889.....	39,000
1890.....	39,000	1891.....	42,250
1892.....	44,600	1893.....	67,600

That during this period sixteen mortgages on lands in Benton County were executed to Mr. Nash.

The following shows the mortgage loans, as shown by the mortgage records of Tippecanoe County, for each of the following years, to wit:

1883.....	$23,483	1884.....	$22,633
1885.....	21,633	1886.....	20,033
1887.....	16,432	1888.....	25,533
1889.....	27,433	1890.....	29,066
1891.....	23,366	1892.....	31,416
1893.....	30,316		

The total mortgage loans in Benton and Tippecanoe Counties aggregate the following amounts for each of said several years:

1883.....	$23,483	1884.....	$27,633
1885.....	26,333	1886.....	59,033

1887.....	55,433	1888.....	64,533
1889.....	66,433	1890.....	68,066
1891.....	65,616	1892.....	76,016
1893.....	97,916		

During this period thirty-six mortgages were executed to Nash and seventeen releases were executed. The record shows that during the term of the three agencies of Andress, McCormick and Buck 158 mortgages and 137 releases were executed, and that thirty mortgages were foreclosed by court decrees. The record also shows four mortgages were negotiated, sold and assigned.

According to Buck's testimony these were not all the loans made by him. He had customers who came into the office and wanted to borrow money on short time on personal security. He made some such loans. Extent of the same not shown.

The above statement of money loaned does not include $20,000 loaned to Adams Earl in 1883 by Mr. Buck for Mr. Nash.

During the term of Buck's agency money was sent to him from time to time from Cincinnati, placed on deposit in the bank at LaFayette, and afterwards loaned by Buck. This frequently occurred after 1887.

Prior to the first of April, 1884, Ohio notes of the value of $32,229.08 were sent from Cincinnati to Mr. Buck, and were kept by him continuously in the safe in Nash's office in the City of LaFayette, Indiana, thereafter until they became due.

In 1885, he had $98,138 of such notes;
In 1886, he had $129,885 of such notes;

In 1887, he had $198,612 of such notes;
In 1888, he had $241,457 of such notes;
In 1889, he had $221,599 of such notes;
In 1890, he had $282,524 of such notes;
In 1891, he had $311,944 of such notes;
In 1892, he had $369,636 of such notes;
In 1893, he had $309,858 of such notes.

The Ohio notes and mortgages in the amounts named above were permanently kept and held by James Buck as the agent of Nash in the city of LaFayette, Indiana, kept in the same safe, in the same office, and placed upon the same register as the Indiana notes, and in all things treated the same as the Indiana notes, except they were sent to Cincinnati for collection when they became due. Said amounts are as found by the court and are as agreed upon by the parties.

The theory of the plaintiff in error as to why these Ohio notes were kept in Indiana, as given in the third paragraph of answer of plaintiff in error and in his counter claim, is that they "were kept on deposit in the city of LaFayette only and merely for convenience and safety, and not otherwise." The plaintiff in error testifying, in answer to a question as to how these notes payable and dated in Ohio, and the mortgages securing them, happened to be permanently kept and held by him in the city of LaFayette, said:

> "After I came into Mr. Nash's employ he used to visit me about twice a year; he would generally come to Cincinnati and then come up here. When he would come up here he would have his bank

book, or pass book as it is called, what we all use when we make a deposit in the bank; he would bring it to me and ask me to figure it over and see if it was figured up right; I did it for a time or two, possibly twice, and I asked him what was the object of this, and he said I want to see if Mr. Goodman is crediting me down there; I said, 'This don't show it, and you can't tell it from this book.' 'I would like to know why,' he said, and I said, 'This is simply a duplicate of their bank book, you can't tell from it'—in other words, whether he has given you credit with all the collection he has made for you or not, and I suggested to him that the proper way for him to do that was to have Mr. Goodman send me a memorandum of all the loans he had made for Mr. Nash and then for Mr. Goodman to report to me the collections he would make, and then when he came out with his bank book we would check over and see if he had collected from all the loans he had to collect on. The result of this conversation was that Mr. Nash ordered me to have a memorandum book made, or rather register, as I would call it, and he said he would have those loans all sent up here and have me make a memorandum of them for that purpose; for the purpose of getting them into a memorandum so that he could check over to see whether Mr. Goodman had given him credit for all the collections upon all the loans he had made for him.

"He said he would have Mr. Goodman either send me a memorandum of the loans, or he would have the loans sent out here so I could make a record of them; that he would talk to Mr. Goodman about it, and the result of the matter was Mr.

Goodman sent the mortgages to me; no memorandum.

"I made record; put down showing where it was from, amount of principal note and interest note, date of note and mortgage, time when due. Goodman wrote to me to keep loans he was sending; I made memorandum of them and put them in the burglar-proof safe; sent them back each month if they were due for collection; no one else had custody or control of them; they were never sold or pledged. Goodman and Nash both had superior control. Notes were paid in Cincinnati; money deposited in the National LaFayette Bank; none sent to Indiana."

It is true that during the term of Buck's agency money was sent to him in LaFayette from Cincinnati to be invested and by him placed on deposit in the bank and afterwards loaned for Nash; that this did not frequently occur prior to 1887, but that it did frequently occur after 1887. This is Buck's own testimony.

Cincinnati bank does large business. Nash had a safety deposit box there; kept bonds in safety deposit vault in bank building; had no office in Cincinnati.

In LaFayette Nash had an office; had two safes that were owned by him; Nash paid office rent; Buck felt in danger with securities in safe and moved safe from Nash's office in LaFayette over into the vault of the Merchants' National Bank.

The answer and the counter claim of plaintiff in error avers the value of the bonds kept in Cincinnati to have been $174,000.

Ohio notes continued to come from time to time after 1884 until Nash's death. They were usually sent from Cincinnati, Ohio, by Mr. Goodman. Buck listed them in a book; gave the name of the debtor, the character and the amount and the date of the note and when due. Notes were accompanied by the mortgages and interest notes separate and apart from the principal note. He listed them in the same book in which he listed the Indiana notes and mortgages. His orders were to keep the Ohio notes until the interest or principal should fall due, then send them to Mr. Goodman. When he sent notes and mortgages back to Cincinnati for collection he would write on the register, under the head of "Remarks," "Sent W. A. Goodman," with the date.

We again quote from Buck's testimony:

> "When Mr. Nash would come out here he generally would stop at Cincinnati and have his bank account made up, his bank book, and he brought it to me to have me figure it over to see if it was correct. I did this a few times and I finally asked him what the object was, and he said to me it was for the purpose of ascertaining whether Mr. Goodman was giving him credit in Cincinnati for all the collections upon the loans made by Mr. Goodman down there. I said to him, it didn't show whether Mr. Goodman was giving him credit or not. That the book did not show that fact. I said to him that I thought the best thing he could do would be to have Mr. Goodman send me a memoranda of all the loans he had for him, and ask Mr. Goodman to report to me when he made the collec-

tions, and that then when he came out here I could check over with him his bank book, and we could tell then whether he was getting credit for all the collections upon all the loans Mr. Goodman had made for him.

"The bank book he spoke about was his Cincinnati bank book; the thing he wanted me to ascertain was whether or not Mr. Goodman was giving him credit on this book for all collections made. Instead of sending me a memorandum Mr. Goodman sent me the notes themselves.

"I told Mr. Nash that the proper way was to have Mr. Goodman send me a memorandum of all the loans that he had for him down there, and then we could check over every time he came out here and see whether he was getting credit for all the collections Mr. Goodman had made for him, and I suggested to Mr. Nash that he have a memorandum book made so that I could put these loans down, these mortgage notes in this memorandum book, and the result was he ordered me to have such a book made, and I did. He never sent me a memoranda of the loans, he sent the notes and securities. When I sent a note to Mr. Goodman for collection he would write me that a certain note had been paid, and I would note it on the book opposite to the note to which it referred, then my memorandum book would show in regard to each note that the note was sent at a certain time to Mr. Goodman for collection, and at a certain time had been paid to Mr. Goodman.

"Sometimes the notes would come back renewed by writing across the back 'Renewed' for one or

two or three or four or five years; then I would keep it here until it became due and then send it to Mr. Goodman; the money was put in the National LaFayette Bank at Cincinnati, Ohio.

"Bonds were kept in a safety deposit vault in Cincinnati. Bonds and securities were kept in safety deposit vault of Safety Deposit Company's building in Cincinnati."

The plaintiff in error testified, in the hearing before the auditor prior to the assessment made by that official, concerning the Ohio notes as follows:

"They were kept in my care; I had a record of them; I collected the interest on them; that is, in this way, when a mortgage was sent here it was sent here by his agent in Cincinnati to me to make the record, which I did; I then laid it away in the vault and when the interest became due I sent it to his agent, the interest note for collection; he would collect it and send me a report that he had collected it and deposited it in his bank down there, and I would mark it so on the mortgage record. I would keep it, the principal note, here until it was due, and would then send it to his agent who, if it was paid, would send me a certificate from the bank, not a bank certificate, but send me notice that the note was paid, and I would then mark it off the book as a paid note."

The Cincinnati business was in the hands of William A. Goodman as agent. Nash kept no office in Cincinnati. He did business through the National LaFayette Bank, of which Goodman was president. Nash kept a box rented

in the Safety Deposit Company's vault where he kept his bonds, stocks and securities.

William A. Goodman testified:

"Nash, when he was here, advised with me as to his investments, and he trusted me with his money to invest; what spare money he had; I was to invest his money in mortgage securities in Ohio. I think it was during 1860 until his death. All loans were secured by notes and mortgages; all invested in Cincinnati; all payable in Cincinnati. Payable to Nash or others and assigned to him. No other person acting as agent for him in Ohio; my management did not extend to business affairs outside of Ohio.

"Notes paid at bank in Cincinnati; all collections put to his credit; never sent any money to Indiana that I recollect of.

"I had absolute control of them; I had possession or control from the time they were made until paid or disposed of in some way or other.

"Some times they were sent by me for record to Mr. Buck as agent. Nash desired Mr. Buck to have a memorandum of the notes and he returned them to me generally within a few days after they were recorded; they were sent there for that purpose and not for collection; never assigned, sold or hypothecated them, and never used them in any business.

"Numerous notes and mortgages owned by Nash that were never sent to Buck or to LaFayette. Nash knew I did not send all the mortgage notes there; he was willing to trust me.

"I was president of National LaFayette Bank,

> Cincinnati, twenty years; old bank; has all equipments of a bank; Nash had rented box in the safety deposit vault where he kept bonds and stocks; mortgages and notes sent to LaFayette for record; Buck kept his private books here; had record here."

The record in this case conclusively shows that during Nash's life

NO TAXES WERE PAID

on the Ohio notes.

Plaintiff in error himself testified that no taxes were ever paid in the State of Indiana on the Ohio notes and mortgages; that the Ohio notes were sent by him in bulk just before the first day of April by express and returned addressed to him just after the first day of April in the same envelope but with another envelope over them.

In this connection Mr. Buck said:

> "From the 25th to the 28th of March I would send all the Ohio notes and mortgages to Cincinnati in care of Mr. Goodman; send them all in one package by express; receive them back by express, in one package, directed to me; generally in the same package or envelope in which I sent them; when I would send these notes away I would simply make a check mark opposite each note in pencil on note book, and when they returned I would mark out the check mark; this was simply a memoranda of my own to know that I got the notes back.
>
> "In 1886, a gentleman in this town, now dead, and I were talking about Mr. Nash's taxes. He

asked me what he was paying taxes on and I told him. He asked me what I had here and I told him. He said to me he thought I was doing wrong and possibly laying myself liable by not giving in all his property here for taxation, and he told me very plainly that it was my duty to do so. I wrote to Mr. Nash the circumstances and said to him that I understood the law was that I was compelled, as his agent, to give in every bit of property I had here in my hands for taxation, and that when the first of April came I should do so if it was in my hands, and he wrote me then to send all the paper, all the notes and mortgages that were made in Ohio, to him at Cincinnati, and he would attend to the taxation himself, giving them in for taxation himself. This was previous to the first of April, 1887. I never sent Ohio notes in bulk prior to 1887; they had been in Mr. Nash's office in the city of LaFayette on the first day of April of each year prior to that time. There was nothing given in for Mr. Nash for taxation from 1881 to 1886, inclusive; no personal property."

In Mr. Buck's examination before the auditor he said:

"I did not give in any notes for assessment outside of Indiana for the reason he had instructed me on the last days of March of each year to put in a package and send all these notes to him to Cincinnati in the care of his bank, and he would attend to giving them in for taxation himself. Sent them last days of March, say from the 25th to the 27th or 30th of March; got them back about the 10th of April; when it was necessary for him to have them back here for the purpose of collecting any interest

I would order them back if he was not there himself; and I would hold them until the next year. I never gave in any of them after 1887, because they were out of my hands by his orders on the first day day of April.

"He did not tell me what the reason was he wanted me to send them down there to him. Just to give you an idea how this occurred: I want to be fair in this matter; I propose to tell the truth; he wrote me a letter from New York, probably two of three weeks before it was time to give in the property for assessment after I went into his office, which would be in 1886, in which he ordered me to only return for taxation the notes and mortgages in Tippecanoe County; I wrote him back that I could not do it; that I understood the law was such that it made it the duty of an agent to give in for taxation all the property that he had in his hands on the first day of April, and to swear to it, and that I would not swear to a lie for his property; he would have to get some one else; he then wrote me to send the paper, except the paper in Tippecanoe County, to Cincinnati, and he would attend to giving it in for taxation himself; I sent that year only the mortgages and notes that were due in Ohio; there was a great amount of paper held out in Benton County, some in White, and against his orders I gave in here all the paper I had in the State of Indiana. I spoke to him when he came out and told him why I did it; I said to him, 'The tax sharks are after all the wealthy men just now, and I think the best thing that could happen you would be to give this thing in, and I done it and disobeyed your orders, and I am ready to take

my discharge.' He said, 'You will not be discharged; I guess you done right.'"

The testimony of William A. Goodman clearly shows that no taxes were paid on the Ohio notes in the State of Ohio during the lifetime of Mr. Nash. He testified:

> "All the property that was in his name was taxed because I paid the taxes on it; we sometimes had to take real estate for loans in closing up loans, and in cases of that kind real estate was put in his name; it was taxable. During Nash's lifetime I never gave in any of these Ohio notes for taxation. We paid at Nash's death all the taxes that the auditor claimed were due upon them amounting from forty to fifty thousand dollars. We went back five years and paid all the taxes they claimed. The auditor of the county insisted that as I invested money for Nash and did not return it for taxation as was required at his death it was claimed and the attorneys and myself concluded that in order to avoid litigation with the county auditor to make and list for taxation the property, and we did so, and paid the taxes for five years."

James H. Kelly, a witness for plaintiff in error, testified:

> "I made a return for taxation myself as agent for the estate of Job M. Nash, in the last days of July, 1893; I made a return for taxation for the year 1893; and for five years preceding; for the years 1892, 1891, 1890, 1889, 1888. I made the return to the auditor of Hamilton County, Ohio. On the return I made the taxes for these years respectively were paid. I personally carried the

check to the treasurer to pay the taxes for these years preceding 1893, and also for the year 1893. All taxes due from the estate of Job M. Nash to this State are paid; made return between the time of his death and the probating of his will; property was not listed by items; property that I listed was not itemized by me; it was listed in the aggregate or lump."

A. J. Horton, a witness for plaintiff in error, testified that the only taxes Nash paid in New York was on account of money that he had on deposit in White Plains, Westchester County, New York.

The evidence in this case conclusively establishes the fact that Job M. Nash, during all the days of his life, was a skillful, adroit and continuous

TAX DODGER.

In 1887, A. O. Behm caused to be placed upon the tax duplicate in Tippecanoe County, in the State of Indiana, $40,235 of mortgage securities omitted by Nash from taxation in said county; in 1878, $57,333; in 1879, $55,986.

No return whatever was made by Nash, or by plaintiff in error, his agent, or by any other person for him in Tippecanoe County, in the State of Indiana, for any of the years from 1881 to 1886, inclusive.

In 1893, plaintiff in error sent an Indiana note, executed by Minerva Fowler, for $27,000, to Ohio along with the Ohio notes and omitted it from taxation.

It is shown in the pleadings in this cause, by the evidence and by the agreement of the parties in the record,

that Indiana notes were omitted from taxation for each of the following years and in the following amounts:

1881.....$1,600	1882.....$2,300
1883..... 2,900	1884.....10,750
1885.....10,050	1886.....47,050
1893.....21,400	

The taxes due on these notes were tendered before the bringing of this action and after the action paid into court by the plaintiff in error.

It is admitted, in addition to the above, that Indiana notes and mortgages were omitted from taxation by plaintiff in error, as the agent of Mr. Nash, in the following sums and for the following years:

1881.....$43,122	1882.....$27,900
1883..... 21,634	1884..... 16,381
1885..... 14,954	1886..... 12,806

In 1901 and since the bringing of this action these notes were listed for taxation, and the taxes thereon have been paid.

In 1893 plaintiff in error sent ten Indiana notes to Cincinnati and omitted them from taxation.

Plaintiff in error testified:

> "The last year, 1893, he (Nash) wrote me from New York to return to him in Cincinnati, with the Cincinnati paper, the notes for new loans I had been making in Benton County and White County, and I did that to the amount of somewhere in the neighborhood of $22,000."

This record presents an instance of a man investing more than a half million dollars in bonds, stocks, notes and mortgage securities during a long lifetime, without the payment of any taxes thereon.

He paid none in New York, the State of his domicile; he paid none in Ohio, where the Ohio notes were executed and made payable; he paid none in Indiana, where the Ohio notes were permanently kept in the hands of an agent who conducted a general real estate, mortgage and brokerage business in his name and for him.

The evidence shows the complaint in this cause was filed January 8, 1897; counter claim and answer filed October 22, 1897.

On October 22, 1897, plaintiff in error tendered and paid into court on account of mortgage securities included in the auditor's assessment in this cause $1,436.99.

In July, 1901, plaintiff in error paid taxes in the sum of $328.25 on account of the Minerva Fowler note of $27,000, omitted from taxation for the year 1897.

December 12, 1901, plaintiff in error paid taxes in the sum of $1,502.21 on account of Indiana notes omitted from taxation in addition to those omitted and for which taxes had been paid or tendered.

Total amount of taxes paid and tendered since the bringing of this suit on account of the Indiana notes included in the assessment in issue and omitted from taxation, $1,230.50.

In addition to the mortgage, loan and brokerage business conducted in behalf of Nash in LaFayette, a general

real estate business was conducted and managed there by his agents. This is shown in detail by the record.

In 1880 Nash owned in Tippecanoe County, Indiana, 1,211 acres of land.

In 1881 he owned 1,799 acres; an increase of 588 acres.
In 1882 he owned 1,455 acres; a decrease of 344 acres.
In 1883 he owned 1,180 acres; a decrease of 275 acres.
In 1884 he owned 1,255 acres; an increase of 75 acres.
In 1885 he owned 1,385 acres; an increase of 130 acres.
In 1886 he owned 1,205 acres; a decrease of 180 acres.
In 1887 he owned 1,271 acres; an increase of 66 acres.
In 1888 he owned 1,150 acres; a decrease of 121 acres.
In 1889 he owned 1,082 acres; a decrease of 68 acres.
In 1890 he owned 999 acres; a decrease of 83 acres.
In 1891 he owned 788 acres; a decrease of 211 acres.
In 1892 he owned 494 acres; a decrease of 294 acres.
In 1893 he owned 239 acres; a decrease of 255 acres.

The aggregate number of acres bought and sold from 1880 to 1893 was 2,690 acres.

James Buck had charge of all this business. It passed through the office of Nash in LaFayette, Indiana. Buck collected the rents, sold the grain and invested the proceeds from such handling.

The foregoing is a careful and we believe a correct statement of all the facts essential to the consideration of this case as disclosed by the record.

III.

ARGUMENT UPON QUESTIONS OF FACT.

The only property, the assessment of which is in issue in this case, is certain notes designated in the pleadings and in the evidence as "Ohio notes." It is the theory of the plaintiff in error that these notes were kept on deposit in the city of LaFayette, Indiana, only and merely for convenience and safety, and not otherwise. This theory is followed in counsel's statement of fact and in the assignment of errors We quote from their brief:

> "Said items of property so taxed, being the Ohio notes and nothing else, were never used or invested in any business in Indiana, nor had they arisen out of any business or investments in Indiana, but were actually and permanently invested in business in Ohio during all of said time, and were never in Indiana during any part of said time except at times for safe keeping and convenience." Brief of plaintiff in error, page 10.

The evidence, however, wholly fails to support such theory. The safes in Mr. Nash's office in LaFayette, Indiana, were not a place to which valuable securities would be sent from Cincinnati for safe keeping by a man who had a safety deposit box in a safety deposit vault in a large, long-established and well-equipped banking business in the city of Cincinnati, where he kept on deposit for safe keeping $174,000 of bonds and other securities and where the agent who invested the money for him lived. The fact that he continued to keep and rent the box in

the vaults of said Security Company in Cincinnati, where said agent lived, and in which he kept on deposit $174,000 of other valuable securities, utterly overthrows the contention that the mortgages and notes sent to Mr. Buck, in LaFayette, were sent there for safekeeping. The character of the safes in Mr. Nash's office where the Ohio notes were kept, were such as to preclude this. They were of such character as to cause Mr. Buck to feel that the securities kept therein were not secure but were in danger, and after the death of Nash he moved the safe in which they were kept from Nash's office in LaFayette, over into the vault of the Merchants' National Bank. This is the testimony of the plaintiff in error himself.

And yet counsel would have this Court believe that Nash sent from $30,000 to $300,000 of notes and mortgages from Cincinnati, where he had a rented box in a safety deposit vault and where he continued to keep on deposit nearly $200,000 of other securities, to Mr. Buck, in LaFayette, Indiana, to be kept by him in an ordinary office and in an ordinary fire-proof safe, for *safe keeping.* What Mr. Buck or any one else may now say as to such being the purpose of sending the Ohio notes to Indiana is of no value in the light of the undisputed facts to which we have just referred. Mr. Buck himself nowhere swears that the purpose of sending the Ohio notes to Indiana was their safe keeping, and no such inference can be drawn from the facts and circumstances in this case by any intelligent and honest mind. Nash was neither an imbecile nor a fool. He was shrewd and careful. He did not send

the Ohio notes from a place of security in Cincinnati, to an insecure place in LaFayette for safe keeping. The real purpose that actuated him in sending these securities to Indiana is made apparent and conclusive by the facts and circumstances and the record to which we will later refer.

The facts and circumstances in evidence no more justify the contention that the Ohio notes were sent to LaFayette for "clerical convenience" than they justify the contention that they were sent there for "safe keeping." In the preceding pages of this brief is set out the testimony of Mr. Buck as to why the Ohio notes were sent to LaFayette. The real reason of their being sent there, however, is not given in the conversation detailed by Mr. Buck between himself and Mr. Nash. According to the theory of that conversation the purpose of sending the Ohio notes to LaFayette was that Mr. Buck might keep tab on Mr. Goodman and know what notes were collected and what money belonging to Mr. Nash went into the hands of Mr. Goodman. That when Mr. Nash came to Indiana he could bring with him his bank book, showing his account with the LaFayette National Bank, of Cincinnati (of which Goodman was president), and by comparing the deposit accounts in such bank book with the amount of money received by Goodman from the Ohio notes, as shown by the record kept by Buck, determine whether Goodman had accounted to Nash for all moneys belonging to Nash coming into his hands.

This could only be done by sending to Mr. Buck all the

securities in Goodman's hands of whatsoever kind and character, so that no money from any of Nash's investments could come into Goodman's hands without Buck knowing it. If any securities were not sent to Buck and were not registered by him, but were left in Goodman's care and possession in Cincinnati, Buck could not know whether Goodman was accounting to Nash for all the money received by him, and the purpose of sending the Ohio notes and mortgages to Buck, as contended for by him, would abort.

It is agreed in writing in this cause that $174,000 of bonds owned by Nash, were kept in Cincinnati, and were never in Indiana, and that Buck had no record of these.

It is also within the undisputed evidence in the cause that numerous notes and mortgages owned by Nash were never sent to Buck or to LaFayette, but continued in the possession of Mr. Goodman in Cincinnati. That Buck had no record of them, and that Nash knew that Goodman was not sending all the Ohio notes and mortgages to LaFayette, and that Buck was not getting a complete record or list of such notes and securities; that he knowingly left numerous Ohio notes and mortgages in the hands of Mr. Goodman in Cincinnati, and that he was willing to trust them to Mr. Goodman. Goodman was the witness of the plaintiff in error. He so testifies. His testimony is undisputed.

His language is:

> "Sometimes they (Ohio notes) were sent by me for record to Mr. Buck, as agent. Numerous

> notes and mortgages owned by Nash were never sent to Buck or to LaFayette. Nash knew I did not send all the mortgage notes there; he was willing to trust me."

From the above it is apparent and conclusive that the Ohio notes were not sent to LaFayette "for mere clerical convenience." If safe keeping had been the object in the mind of Nash the Ohio notes would have been kept in his rented box in the safety deposit vault of the Safety Deposit Company in Cincinnati, and not in a small, iron safe in an ordinary broker's office in LaFayette.

If "mere clerical convenience" had been the object sought, the Ohio notes and mortgages would have been kept in Cincinnati, in the care of Mr. Goodman. If he had desired Buck to keep tab on Mr. Goodman, as indicated in the conversation detailed by Buck, he would have required all the securities to be sent to LaFayette, and would have required Buck to make a list and keep an account of all such securities. The trial court did not believe the "safe-keeping and clerical-convenience" theory of the plaintiff in error, nor can your Honors believe it in the light of the facts and circumstances surrounding the actions of the parties during the agency of Mr. Buck. Nor is it true that Mr. Goodman had superior control of the Ohio mortgages sent to Mr. Buck, nor that Buck's control was subordinate. It is true that Mr. Goodman testified:

> "I had absolute control of them; I had possession or control from the time they were made until paid or disposed of in some way or other."

It is also true that Buck testified that both Goodman and Nash had superior control, and it is also true that he testified that no one else than himself had custody or control of them.

But Mr. Buck's authority over the Ohio notes and any other notes owned by Mr. Nash is fortunately not left to the faulty memory of either Mr. Buck or Mr. Goodman. His power and authority over the securities owned by Mr. Nash is in writing in evidence in this record, and speaks for itself. Mr. Nash did not leave the question of Mr. Buck's authority to the uncertainties of oral expression. He put it in writing, and gave his solemn acknowledgment thereto under seal.

By a power of attorney, formally prepared and solemnly acknowledged, he gave authority to Mr. Buck

> To release and discharge of record any mortgage that may have been given, or that may hereafter be given to me, when the same shall be fully paid and satisfied to me. Also if any person or persons shall purchase any notes or mortgages that may have been given or that may hereafter be given to me, said James Buck is authorized to transfer such notes and mortgages, without recourse on me, and to surrender any notes, mortgages or bonds that may be or may have been given to me as collateral security, whenever the obligation to secure which such collateral was or may be given has been fully paid and satisfied to me, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsover, requisite and necessary to

be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all my said attorney or his substitute may or shall lawfully do or cause to be done by virtue hereof."

It can not be contended, under this power of attorney, that Mr. Buck's authority was limited to the Indiana notes. Had Mr. Nash desired to have Buck's authority so limited, he knew well what language of limitation to use. In his power of attorney to Andress, made in 1873, he was careful to limit Andress' authority to release mortgages to mortgages executed to him or transferred to him by assignment, "and recorded in said county of Tippecanoe, or in any of the other counties of the State of Indiana." When he commissioned Mr. Buck he was careful to make no limitation. The language is "any notes or mortgages that may have been given or that may hereafter be given to me."

The above power of attorney clothed Buck with absolute authority and control over all the mortgages belonging to Nash and coming into his possession. He could release them of record. He could negotiate, sell, assign and transfer them. He could even authorize any one else to release them of record, negotiate, sell, assign or transfer them, for he had "full power of substitution." He exercised control over the Ohio notes. He determined when it was necessary to send them to Ohio for collection, for he solemnly swears:

> "When it was necessary to have them back here for the purpose of collecting any interest I would order them back if he (Nash) was not there himself, and I would hold them until the next year."

An argument based upon a false premise, however logical and forceful, is as weak as a chain with a broken link. So it is with the able and learned argument of counsel. They build it upon a false premise, and it can not stand.

Counsel are also in error when they state:

> "That all money paid or received on account of the said Ohio notes was deposited and kept in Ohio. All money so paid was kept in Ohio, and no part of it was ever sent to Indiana."

Plaintiff in error himself testifies that money was sent to him from time to time from Cincinnati, placed on deposit in the bank at LaFayette, and afterwards loaned by Buck in Indiana. That this occurred frequently after 1887.

This is not disputed. Mr. Goodman's testimony is:

> "Never sent any money to Indiana that I recollect of."

He does not undertake to swear that none of the money received from collections on account of the Ohio notes was ever sent to Indiana. His language is "none that I recollect of." Buck's testimony is positive that this frequently occurred after 1887. In 1883 the aggregate mortgage loans in Indiana were $23,483; in 1893 they were

$97,916, an increase of $74,433. The money for this large increase in Indiana loans necessarily came from somewhere. Buck says it frequently came from Cincinnati. The inference, therefore, is irresistible that out of the funds created by the collection of Ohio notes and placed on deposit to Nash's credit in Cincinnati from time to time there were sent to Mr. Buck money from which he made loans in Indiana. It is important, also, to know that the $97,916 of loans made in Indiana in 1893 did not include money loaned to customers who came into the office and wanted to borrow money on short time on personal security. Some such loans were made.

As before suggested, Mr. Nash was neither an imbecile nor a fool, but the evidence in this cause shows without question that he was a shrewd, skillful, experienced and persistent tax dodger, and that the real reason for sending the Ohio notes and securities to LaFayette, and of having them permanently kept there, was that he might escape the payment of taxes thereon. His domicile was in New York. The Ohio notes were executed by persons living in Ohio, were made payable there, and were secured by mortgages on lands in Ohio. If the notes were kept there they would have been taxable in the State of Ohio. Had they been sent to him in New York they would have been taxable to him in New York. If they were sent to Indiana, there being no public record of them in that State, they would escape taxation there. Not being physically present in New York they were, as we shall hereafter show, not taxable in New York, the place of

his domicile. Neither he nor the notes being in Ohio, they were, as we shall hereafter show, not taxable in Ohio. If they could be permanently kept in Indiana, and knowledge of their presence kept from the taxing officers of this State, they would escape taxation altogether. This is exactly what was accomplished. No taxes were ever paid on them in Indiana.

No taxes were ever paid upon them in Ohio during the lifetime of Nash.

No taxes were ever paid upon them in the State of New York.

No return whatever was made for Nash on either the Ohio or Indiana notes from 1881 to 1887, inclusive. After that only a portion of the Indiana notes were returned. For the years 1884, 1885 and 1886 Buck aided and abetted Nash in his purpose to sequester the Ohio notes from taxation, and made no return of them whatever. None of the Indiana notes or of the Ohio notes would have been given in for taxation in 1887 had it not been for a conversation between Mr. Buck and a gentleman upon whose friendship and knowledge of the law Buck relied. In that conversation this friend told Buck that he was doing wrong and laying himself liable by not giving in all of Nash's notes here for taxation, and he told him plainly it was his duty to do so. Buck then wrote to Nash the circumstances, and said to him that as he understood the law he was compelled to give in all the notes held by him, and that on the first day of April he should do so if they were in his hands. Nash wrote him

to send all the Ohio notes and mortgages to Cincinnati, and he would attend to the taxation himself. Buck did this thereafter from year to year just prior to the first day of April, and received them back again a few days after the first day of April, but Mr. Nash did not give them in for taxation himself. The sending of these notes to Ohio for three or four days covering the first day of April, was simply the trick and device of a dishonest man who was seeking to defraud the State where he lived, the State where he did business and the State where these notes were permanently kept. The circumstances that impelled Buck to write to Nash and caused him to order these notes returned as indicated above; the fact that the package in which they were sent was never broken, that it was returned just after the first day of April each year, clearly reveals the purpose in the mind of Mr. Nash and leaves his motive too apparent for discussion. *The truth is, he deliberately and for the purpose of evading taxation, chose the State of Indiana as the place for the permanent situs of the notes and mortgages in issue in this case. He elected to give them a situs in Indiana and did give them a situs there by his act of sending and keeping them there.*

In 1877 Nash secreted from taxation more than $40,000 of Indiana securities; in 1878 more than $57,000; in 1879 more than $55,000. In 1893 plaintiff in error sent the Minerva Fowler note of $27,000, the same being one of the Indiana notes, to Ohio, and it was omitted from taxation, and in 1893 Nash wrote Buck from New York to return to him at Cincinnati with the Cincinnati paper

just prior to the first day of April the notes for new loans he had been making in Benton and White Counties. Buck did so to the amount of somewhere in the neighborhood of $22,000.

The real purpose of giving the Ohio notes and mortgages a situs in Indiana, separate and apart from the place where they were executed and where they were made payable, is made so clear and apparent by facts and circumstances contained in the record that your Honors will be driven, as the State Court was driven, to brush aside the flimsy theory of "safe keeping and mere clerical convenience" contended for by plaintiff in error. His purpose was to evade the payment of taxes. That, and that only. To do that he gave these notes and mortgages a secret but permanent location and situs in the city of LaFayette, and placed them in the permanent care, keeping and control of an agent, who, by express, written authority formally prepared and solemnly acknowledged, had power to sell, transfer, assign and barter them at will.

By the above statement of facts, every word of which is sustained by the record in this cause, we have made clear the real purpose of the presence of the Ohio notes in Indiana. We now call your Honors' attention to the

CHARACTER OF THE SITUS

given to these notes in Indiana.

Nash, a resident of and domicile in New York, for twenty years before his death kept and maintained a real estate and broker's office in the city of LaFayette, Indi-

ana. He owned many farms in Tippecanoe and other counties in Indiana, and city property in LaFayette. His office and place of business was of the most permanent character. It was equipped with furniture, books, ledgers for keeping accounts, fireproof safes for the keeping of books and papers, and a register of all the loans made in Indiana and of all notes coming into the possession of such agent. It was his office. He paid the rent and employed an agent, into whose charge and keeping he gave the office and the business transacted therein. This agent had charge of his office, loaned his money and took notes and securities therefor; kept his accounts and had full charge and care of all books, papers, and securities belonging to Nash, and kept in said office; sold and bought real estate; rented real estate and collected rents accruing thereon; had power to release any mortgage given to Nash, either in or out of the State of Indiana; to negotiate, sell, transfer and assign any note, mortgage or security in his possession and belonging to Nash, whether in or out of Indiana.

During the twenty years 158 mortgages were executed to Nash through the LaFayette office; 137 releases were executed; four mortgages were negotiated, sold and assigned; and the protection and power of the courts of Indiana invoked in the foreclosure of thirty mortgages; the money loaned reached at various times more than $100,000, exclusive of personal loans which some years amounted to more than $20,000. In ten years 2,690 acres of land were bought and sold through said office.

Such was the character of the business established and conducted by Mr. Nash, through his agent, Mr. Buck, and of which Mr. Buck had control, when before the first of April, 1884, Nash caused to be sent to him to be by him permanently kept in said office, listed and cared for, $32,229 of promissory notes secured by real estate mortgages executed by citizens of Ohio, payable to Nash's order at Cincinnati, Ohio, and secured by mortgages on real estate situate in Ohio. Each of these Ohio loans was represented by one principal note running from three to five years, and the payment of which was frequently extended beyond that time. There were interest notes for each loan, separate and apart from the principal note. Each principal note and the interest notes belonging thereto were secured by mortgage, as before suggested. Each note was accompanied by the mortgage by which it was secured.

In 1885 the Ohio notes so coming into Buck's hands were $98,188 in value; in 1886, $129,885; in 1887, $198,612; in 1888, $241,457; in 1889, $221,599; in 1890, $282,524; in 1891, $312,944; in 1892, $369,636, and in 1893, $309,858.

These notes were permanently kept and held by Mr. Buck in LaFayette, Indiana, as the agent of Mr. Nash, and were controlled by him from the time he received them until Nash's death. They were kept in the same office, placed on the same register as the Indiana notes, and in all things treated the same as the Indiana notes, except that they were sent by Buck to Cincinnati for collection as they became due. The money from such collection was

deposited in Cincinnati, but money from Cincinnati was frequently sent to Buck for investment in Indiana. It was Buck's business to know when the Ohio notes became due, and to send them to Cincinnati for collection or renewal. He was their permanent custodian. They were never out of the State of Indiana except for the temporary purpose of evading taxation there, and then only for eight or ten days—long enough to be sent to Cincinnati, retained during the first day of April, and then returned to LaFayette. They were connected with and a part of the business transacted in the LaFayette office. They were listed. The time of their maturity, the date when given, the name of the maker, the amount and the rate of interest, noted on a register kept for that purpose, exactly as the Indiana notes were listed and data concerning them noted. It was a part of the business of the LaFayette office to receive and take charge of both the Ohio notes and the Indiana notes, to make a list of the same, to keep them permanently, to know when either interest or principal was due, and to see that both principal and interest was collected or the note renewed. Neither the Ohio nor the Indiana notes had any other home or permanent location than the LaFayette office.

IV.

FINDINGS OF INDIANA COURT.

The trial court must have found, and as a matter of fact did find, that the facts were as herein set out. So much of the opinion of the State Supreme Court as relates to the facts is here submitted:

> "The underlying controversy in this case relates to the taxation of certain notes secured by mortgage styled in the record, 'The Ohio Notes.' In 1895 the auditor of Tippecanoe County, after giving notice to the executors of said estate and to appellant, entered upon the duplicate of said county, as omitted property, assessments against said estate, based on said notes, for the years and in the amounts following:
>
> | | |
> |---|---|
> | 1884 | $32,329.08 |
> | 1885 | 98,131.00 |
> | 1886 | 129,885.00 |
> | 1887 | 198,612.00 |
> | 1888 | 241,457.00 |
> | 1889 | 221,599.00 |
> | 1890 | 282,524.00 |
> | 1891 | 311,944.00 |
> | 1892 | 369,636.00 |
> | 1893 | 309,858.00 |
>
> "The auditor also extended taxes upon said assessments aggregating, aside from penalties, $36,357.71.
>
> "During the years above mentioned, and for a considerable time prior thereto, the decedent was in life, and was domiciled in, and a resident of, the State of New York. During the period cov-

ere by said assessment he had a sum approximating $750,000 invested in Ohio and Indiana, much of which was loaned upon notes secured by mortgage upon real estate. For the purpose of collecting the principal and interest on his outstanding investments, and to reinvest the moneys so received, he had an agent in Cincinnati and another in LaFayette. The Cincinnati agent commenced loaning decedent's money about 1860, and upon the removal of decedent to New York, about 1870, until his death in 1893, said agent made investments on decedent's behalf in Ohio, collected principal and interest upon his mortgage loans, and had general charge of his financial interests in that State. The notes on which said assessment was based were made payable to decedent in Ohio, in from three to five years after their execution, and were secured by mortgage on real estate situate in said State.

"James Buck was the agent of decedent at LaFayette during the years from 1884 to 1893. Aside from his duties in respect to Indiana business, Buck kept the Ohio notes involved in said assessment, together with the mortgages securing said notes, in his possession at LaFayette, Indiana, from the time the mortgages were recorded until the notes were due, except that the notes were sent to the Ohio agency to have interest payments indorsed upon them, and except that the notes and mortgages were sent to Ohio just before the first day of April in each year, the Ohio agent returning them a few days afterwards. It was the business of Buck, aside from keeping said notes and mortgages safely, to keep memoranda of the loans rep-

resented by them, and of the transactions concerning them, in a register and to forward said instrument as above indicated.

"It is the theory of appellants that the Cincinnati agent had the legal control of the Ohio notes and mortgages at all times, and that they were sent to LaFayette merely for safekeeping and for clerical convenience. If we were required to accept the conclusions of the two agents, as set out in the transcript of the evidence, as to who had control of said paper, appellant's theory would be maintained by the record, but the court below was authorized to make the opposite deduction from the uniform course of the business in respect to the keeping of said notes and mortgages and from the evidence that decedent gave the direction which established the practice that was pursued in that particular. More than that, the evidence clearly warranted the conclusion that Buck was vested with a control of said notes and securities for the purpose of enabling decedent to escape taxation in Ohio. We must therefore conclude, in support of the general finding, that the court below found that in the conducting of the business of the Ohio agency the decedent separated from said business the possession of said notes and mortgages and vested the right to such possession in said Buck. There was no return for taxation of said notes, or of the investments represented by them, either in Ohio or in New York during the lifetime of the decedent." Record, p. 1055.

"The evidence in this case warranted the conclusion that the agent in Ohio had no general right of possession which would have enabled him

to recall the notes at any time; that his right of possession was limited to the times when the principal or interest was due and to assessment days in Indiana. It is to be recollected that whatever measure of possessory right the Indiana agent had over the notes was in necessary diminution of the possession which might be lawfully had of them by the agent in Ohio. It appears that the possession of the notes in Indiana was the substantial one, while that in Ohio was never more than ephemeral and in some instances merely fugitive. Such possession as the Ohio agent had, assuming that he had no general right of control, was not sufficient to establish the situs of the notes there, as between that State and the one where they may be practically said to have been kept and where an essential part of the business of the agency, as it was actually constituted, was carried on.

"If it satisfactorily appears that neither New York nor Ohio was the proper place for the assessment of said notes, then it must needs be that the appropriate situs for their taxation was in this State.

"Indiana has just grounds on which to claim the situs of said notes. It was the only State in which they were generally kept; they were kept in the hands of an agent here, in the office of decedent, in connection with a business that, however limited as applied to this State, was of a permanent character, and a component part of an entire business sufficiently broad to give such notes a situs other than the domicile of the owner. The additional elements of a power over the paper to surrender it upon payment and to re-invest the proceeds

serve to mark more plainly a business situs, but in this case, where a single business had, for the purpose of transacting it, been split up between two States, we think that the State which not only furnished protection, but which had within it, practically at all times, the concrete evidences of the indebtedness, that alone, so far as the credit was concerned, was subject to taxation, may be treated as the proper situs for the assessment of such paper. This is not a case of notes sent into the State by their owner for safekeeping and clerical convenience merely. The business done by Buck concerning said notes would have clearly been a part of the Ohio business, had it been done in Ohio, but as Buck's duties relative to said notes were transacted in Indiana, as they were required to be, such duties, while attached to the same business, were really a part of an interstate business. That business, as before stated, was of such character as to localize said notes for the purpose of taxation, and the court is therefore called upon to determine the situs of the notes pertaining to the business as between the States in which the business was transacted." Record, p. 1064.

"Furthermore, as it was decedent's purpose to avoid localizing said notes in Ohio, by keeping them in this State, the intent must be imputed to him to establish a situs for that portion of his wealth here, and in a case where the tangible evidences of a man's investments are kept here permanently, in the hands of an agent, to escape taxation elsewhere, we perceive no reason why it would be unjust to him to hold that his paper was within the State." Record, p. 1065.

V.

PROPOSITIONS OF LAW.

1. The State can not be deprived of its right to tax property within its jurisdiction by the owner thereof removing the property temporarily out of its jurisdiction for the purpose of avoiding taxation thereon.

Dundee Company v. School District, 19 Fed. 368;
Savings Society v. Multnomah Co., 169 U. S. 421;
Connecticut Co. v. Town of Monroe, 52 Atl. R. (N. H.) 942;
H. M. Loud & Sons Lumber Co. v. Elmer Township, 123 Mich. 61;
Shotwell v. Moore, 129 U. S. 596;
Ogden, Treas., v. Walker, 59 Ind. 460;
Senour v. Matchett, 140 Ind. at 640;
Crowder v. Riggs, 123 Ind. at 160;
Diamond Match Co. v. Ontonagon, 188 U. S. at 91.

2. In determining what the law of a State is, this Court will look not only at the State Constitution and statutes, but at decisions of its highest court giving construction to them, and the construction given the statute of a State by its highest court will be adopted by this Court.

Wade v. Travis County, 174 U. S. at 508;
New Orleans v. Stempel, 175 U. S. at 316;
Stockard v. Morgan, 185 U. S. at 30;
Williams v. Parker, 188 U. S. at 504;

Williams v. Eggleston, 170 U. S. at 311;
Board of Liquidation v. Louisiana, 179 U. S. at 638;
Yazoo & Mississippi Valley Railroad Co. v. Adams, 181 U. S. at 583;
Mead v. Portland, 200 U. S. at 164;
Armour Packing Co. v. Lacy, 200 U. S. at 234;
Armour Packing Co. v. Lacy, 200 U. S. at 236.

3. The General Assembly of Indiana has power to make notes, mortgages, bonds and other evidences of indebtedness taxable. The question as to the taxability of such property is therefore one of will or intention and not of power.

Hart v. Smith, 159 Ind. at 185, 188, 193;
Gallup v. Schmidt, 154 Ind. at 203;
Western, etc., Co. v. Halliday, 110 Fed. at 264;
Pullman's, etc., Co. v. Commonwealth of Pennsylvania, 141 U. S. 18;
Finch v. County of York, 26 N. W. R. (Neb.) at 590;
Hutchinson v. Board, 23 N. W. R. (Ia.) at 250;
Tappan v. Merchants' Bank, 19 Wallace, 490;
Savings Society v. Multnomah Co., 169 U. S. 421;
Coe v. Errol, 116 U. S. 517.

4. Notes, mortgages, bonds and other evidences of indebtedness are "property" within the meaning of the Con-

stitution, and ought to be assessed for taxation. In the construction of the legislative scheme of taxation the Court ought to impute to the General Assembly an intent to obey the constitutional mandate if its enactments fairly admit of such construction.

Hart v. Smith, 159 Ind. at 185.

5. The Act of 1891 does not limit the taxation of promissory notes, mortgages and other evidences of indebtedness to those owned by inhabitants of this State. On the contrary, it provides for the listing and assessment of all such evidences of indebtedness found within the jurisdiction of the State, without regard to the domicile of the owner.

Acts 1891, p. 199, Sec. 3;
Acts 1891, p. 199, Sec. 4;
Acts 1891, p. 201, Sec. 8;
Acts 1891, p. 201, Sec. 11;
Acts 1891, p. 204, Sec. 19;
Acts 1891, p. 209, Sec. 44;
Acts 1891, p. 210, Sec. 48;
Acts 1891, p. 211, Sec. 49;
Acts 1891, p. 212, Sec. 50;
Acts 1891, p. 213, Sec. 53;
Buck v. Miller, 147 Ind. at 589;
Senour v. Ruth, 140 Ind. at 320;
Finch v. York Co., 26 N. W. R. (Neb.), at 591;
New Orleans v. Stemple, 175 U. S. 309.

6. By the express terms of the statute "the phrase

personal property includes goods, chattels, evidences of debt and things in action."

R. S. 1901, at Sec. 1309.

7. It is not essential that *both* the *owner* and the *thing* assessed should be within the jurisdiction of the State. It is sufficient if *either* is within such jurisdiction.

Pullman's Co. v. Commonwealth, 141 U. S. 18;
Goldgart v. People, 106 Ill. at 28;
In re Romaine Estate, 127 N. Y., at 88;
In re Whiting Estate, 150 N. Y., at 29;
In re Morgan Estate, 150 N. Y., at 35;
In re Houdayer Estate, 150 N. Y., at 37.

8. The Ohio notes were not kept by plaintiff in error in LaFayette for clerical convenience. They were kept there permanently. They had at no time any other permanent location. They were kept there and held and controlled by Buck, as the agent of Nash, under such circumstances as to give them a taxable situs in Indiana.

Acts 1891, p. 199, Sec. 3;
Acts 1891, p. 199, Sec. 4;
Acts 1891, p. 201, Sec. 11;
Buck v. Miller, 147 Ind. at 589, 591, 595 and 596;
Tousey v. Bell, 23 Ind. at 426;
Schmidt v. Failey, 148 Ind. at 153;
Powell v. City, 21 Ind. at 340;
Rieman v. Shepard, 27 Ind. at 289;
Standard Oil Co. v. Combs, 96 Ind. at 183;
Board v. Standard Oil Co., 103 Ind. at 304;

Western, etc., Co. v. Halliday, 110 Federal at 263;
Dundee, etc., Co. v. School District, 19 Fed. at 368;
Billinghurst v. Spaink Co., 58 N. W. R. at 275;
Walker v. Jack, 88 Federal R. 578;
Hutchinson v. Board, 23 N. W. R. (Ia.) at 252;
Black Hawk v. Dorris, 90 N. W. R. (Ia.) at 90;
In re County v. Estate of Jefferson, 28 N. W. R. (Minn.) 257;
Arosin v. London Co., 83 N. W. R. (Minn.) at 340;
People v. Board, 48 New York, 390;
People ex rel. v. Smith, 88 New York, 581;
People v. Gaus, 61 N. E. R. (N. Y.) at 989;
Board v. Davenport, 40 Ill. 200;
Goldgart v. People, 106 Ill. 28;
Matzenbaugh v. People, 62 N. E. R. at 548;
Curtis v. Richland, 56 Mich. at 490;
Comptoir v. Board, 27 So. R. at 805;
Tappan v. Merchants' Bank, 19 Wallace, 490;
Pullman's, etc., Co. v. Commonwealth, 141 U. S. 18;
Savings Society v. Multnomah Co., 169 U. S. 421;
New Orleans v. Stemple, 175 U. S. 309;
Bristol v. Washington, 177 U. S. 133;
Coe v. Errol, 116 U. S. 517;

Diamond Match Co. v. Ontonagon, 188 U. S. 82;
Armour Co. v. Mayor, 41 S. E. R. (Ga.) at 237;
Connecticut, etc., Co. v. Town of Monroe, 52 Atl. R. (N. H.) 941;
Corry v. Mayor, 53 Atl. R. (Md.) 942;
State ex rel. etc., v. Mayor, 40 Atl. R. (N. J.) at 574;
State ex rel. v. Rose, 50 Atl. R. (N. J.) 364;
Bluefields Co. v. Board, 21 So. R. (La.) at 630;
In re Romaine Estate, 127 N. Y., at 88;
In re Whiting Estate, 150 N. Y., at 29;
In re Morgan Estate, 150 N. Y., at 35;
In re Houdayer Estate, 150 N. Y., at 37.

9. The notes and mortgages, upon which the assessment in this case is based, had a "business situs" in the city of LaFayette within the meaning of the law.

Acts 1891, p. 199, Sec. 3;
Acts 1891, p. 199, Sec. 4;
Acts 1891, p. 201, Sec. 11;
Buck v. Miller, 147 Ind. at 589, 591, 595 and 596;
Tousey v. Bell, 23 Ind. at 426;
Schmidt v. Failey, 148 Ind. at 153;
Powell v. City, 21 Ind. at 340;
Rieman v. Shepard, 27 Ind. at 289;
Standard Oil Co. v. Combs, 96 Ind. at 183;
Board v. Standard Oil Co. 103 Ind. at 304;
Western, etc., Co. v. Halliday, 110 Federal at 263;

Dundee, etc., Co. v. School District, 19 Fed. at 368;

Billinghurst v. Spaink Co., 58 N. W. R. at 275;

Walker v. Jack, 88 Federal R. 578;

Hutchinson v. Board, 23 N. W. R. (Ia.) at 252;

Black Hawk v. Dorris, 90 N. W. R. (Ia.) at 90;

In re County v. Estate of Jefferson, 28 N. W. R. (Minn.) 257;

Arosin v. London Co., 83 N. W. R. (Minn.) at 340;

People v. Board, 48 New York, 390;

People ex rel. v. Smith, 88 New York, 581;

People v. Gaus, 61 N. E. R. (N. Y.) at 989;

Board v. Davenport, 40 Ill. 200;

Goldgart v. People, 106 Ill. 28;

Matzenbaugh v. People, 62 N. E. R. at 548;

Curtis v. Richland, 56 Mich. at 490;

Comptoir v. Board, 27 So. R. at 805;

Tappan v. Merchants' Bank, 19 Wallace, 490;

Pullman's, etc., Co. v. Commonwealth, 141 U. S. 18;

Savings Society v. Multnomah Co. 169 U. S. 421;

New Orleans v. Stemple, 175 U. S. 309;

Bristol v. Washington, 177 U. S. 133;

Coe v. Errol, 116 U. S. 517;

Diamond Match Co. v. Ontonagon, 188 U. S. 82;

Armour Co. v. Mayor, 41 S. E. R. (Ga.) at 237;

Corry v. Mayor, 53 Atl. R. (Md.) 942;
Connecticut, etc., Co. v. Town of Monroe, 52 Atl. R. (N. H.) 941;
State ex rel., etc., v. Mayor, 40 Atl. R. (N. J.) at 574;
State ex rel. v. Rose, 50 Atl. R. (N. J.) 364;
Bluefields Co. v. Board, 21 So. R. (La.) at 630;
In re Romaine Estate, 127 N. Y., at 88;
In re Whiting Estate, 150 N. Y., at 29;
In re Morgan Estate, 150 N. Y., at 35;
In re Houdayer Estate, 150 N. Y., at 37.

10. Bank bills, municipal bonds, promissory notes and real estate mortgages have such a concrete form that they are subject to taxation where found, irrespective of the domicile of the owner. If such evidences of indebtedness are kept for an indefinite period, and are given a permanent location within the limits of the State, they are subject to taxation.

Buck v. Miller, 147 Ind. 586;
Tousey v. Bell, 23 Ind. at 426;
Western, etc., Co. v. Halliday, 110 Fed. at 264;
Black Hawk v. Dorris, 90 N. W. R. (Ia.) at 90;
Arosin v. London Co., 83 N. W. R. (Minn.) at 340;
People v. Board, 48 New York, 390;
People, ex rel. v. Smith, 88 N. Y., at 581;
People v. Gaus, 61 N. E. R. (N. Y.) 989;
Comptoir v. Board, 27 So. R. (La.) at 805;

Armour, etc., Co. v. Mayor, 41 S. E. R. (Ga.) 237;
Tappan v. Merchants' Bank, 19 Wallace, 490;
Pullman's, etc., Co. v. Commonwealth, 141 U. S. 18;
Savings Society v. Multnomah, 169 U. S. 421;
New Orleans Co. v. Stemple, 175 U. S. 309;
Bristol v. Washington, 177 U. S. 133;
City of Vicksburg v. Armour Co., 24 So. R. (La.) at 224;
Wagoner v. Whaley, 50 S. W. R. (Tex.) at 154;
Kelley v. Rhodes, 63 Pac. R. (Wyoming) at 938;
Fennel v. Pauley, 83 N. W. R. (Ia.) at 769;
Hardesty v. Fleming, 57 Texas, 395;
In re Romaine Estate, 127 N. Y., at 88;
In re Whiting Estate, 150 N. Y., at 29;
In re Morgan Estate, 150 N. Y., at 35;
In re Houdayer Estate, 150 N. Y., at 37;
Monongahela R. C. C. & C. Co. v. Board of Assessors, 39 So. 601;
People, etc., v. Wells, 77 N. E., at 20.

11. No question in the case at bar, apart from the specific constitutional objection that the assessment of the property in issue contravenes Section 1, Article 14, of the Federal Constitution, is subject to review in this Court.

Blackstone v. Miller, 188 U. S. at 207.

12. The assessment of the property in issue in this cause does not contravene Section 1, Article 14, of the Federal Constitution.

Acts 1891, p. 199, Sec. 4;
Sec. 1, Art. 14, U. S. Constitution;
Pullman's, etc., Co. v. Commonwealth, 141 U. S. 18;
New Orleans v. Stemple, 175 U. S. 309;
Savings Society v. Multnomah Co., 169 U. S. 421;
Comptoir, etc., Co. v. Board, 27 So. R. 805.

VI.

NO CONSTITUTIONAL QUESTION INVOLVED.

The sole question submitted to this Court is this: Do the statutes of the State of Indiana authorizing the assessment of the property in question, and the decision of the Supreme Court construing and upholding said statutes, contravene Section 1, Article 14, of the Constitution of the United States,

1. By taking property without due process of law;
2. By denying to plaintiff in error and his testator the equal protection of the laws;
3. By giving to an inhabitant, resident and citizen of Indiana an immunity from taxation denied to an inhabitant, resident and citizen of New York.

As we have already shown, this question can not be answered upon the hypothesis of fact set out by counsel for plaintiff in error, in the assignment of errors relied on, because the facts are essentially different from those contained in the hypothesis named.

Briefly stated, the question must be answered upon these facts: Job M. Nash, a resident of the State of New York, being the owner of some $750,000 of money, employed an agent in the State of Ohio to invest a portion of said funds in bonds, stocks and notes secured by mortgage upon real estate in Ohio. He also appointed an agent in the State of Indiana to invest a large portion of said money in bonds and notes secured by mortgage upon real estate

in the State of Indiana. Both these agencies were continued for a period of many years. The investments made by the Ohio agent aggregated $400,000 or $500,000; the investments made by the Indiana agent aggregated $200,000 or $300,000. Nash kept no office of his own in Ohio. He did keep an office during the entire term of the Indiana agency in the State of Indiana. He owned the furniture, the books of account and the safes in the Indiana office. He paid his agent a stipulated compensation and executed to him a power of attorney, clothing him with full authority to cancel, negotiate or sell all notes coming into his possession, and to release all mortgages securing such notes whenever the debt represented by any one of them should be satisfied. He caused a large portion of the Ohio notes aggregating $300,000 or $400,000, to be transferred to his Indiana agent, and gave him full power and authority over them. They were transferred to and held by the Indiana agent in the office of Nash in the State of Indiana, during a number of years. None of the Ohio notes were returned for taxation or assessed either in the State of New York or in the State of Ohio during the lifetime of Nash. He chose the State of Indiana as the permanent abiding place for the portion of the Ohio notes sent to Indiana. He selected Indiana as the permanent situs of these notes with the purpose and intent of avoiding payment of taxes in the State of Ohio. He succeeded in his purpose and did avoid the payment of taxes in said State during his lifetime. After the Ohio notes had been in Indiana for three or four years, upon advice

from his Indiana agent that he (the agent) would return all such notes in his possession on the first day of April, for taxation in Indiana, Nash ordered the Ohio notes put in a package and sent out of the State of Indiana a day or two before the taxing date, and caused them to be returned to the Indiana agent two or three days after the taxing date, in the original package which remained unbroken. His purpose in temporarily removing these notes on the first day of April was to prevent his agent from returning said notes for assessment, and to escape taxation in the State of Indiana. In this he succeeded during his lifetime. None of the Ohio notes in controversy were assessed anywhere during his lifetime.

These are the facts in the light of which the constitutional question propounded to this Court must be answered:

1. Because, the lower court and the Supreme Court of the State of Indiana have found them to be true, and the State courts having determined the facts, this Court is bound by their finding.

Blackstone v. Miller, 188 U. S. at 207.

2. Because, the facts as above set out, as we have already shown in this brief, are conclusively shown by the evidence and the record—so conclusively shown, in fact, as not to permit of two opinions or debate.

Counsel for the plaintiff in error contends that the taxation of notes held as these notes were held, was not provided for by statute; that the State Court "judicially amended" the statute and by its decision held

"That as taxable property which the statute purposely obliterated from the list of taxable things in Indiana; and, so doing, * * * acted beyond its lawful powers."

The Indiana statute clearly makes provision for the assessment of this property. It provides that

"All personal property within the jurisdiction of this State shall be assessable."

Section 3, Indiana Tax Act, 1891.

The statute also provides

"For the purposes of taxation, * * * personal property shall include all goods and chattels within the State, * * *; all indebtedness due to inhabitants of this State * * * whether such indebtedness is due from individuals or from corporations, public or private, and whether such debtors reside within or without this State."

Section 4, Indiana Tax Act, 1891.

Section 11:

"All personal property shall be assessed to the owner in the township, town or city of which he is an inhabitant * * * with the following exceptions: * * *

"Fourth: Personal property of non-residents of the State shall be assessed to the owner or person having control thereof in the township, town or city where the same may be."

Acts 1891, p. 201.

Section 19:

"Persons required to list property on behalf of others, shall list it separately from their own, specifying in such case the name of the persons, society, company or corporation to which it belongs."

Acts 1891, p. 204.

Section 44:

"In entering personal property upon the proper tax books for the purpose of taxation, it shall be a sufficient description of the same to use the words 'personal property,' and such phrase shall comprehend and embrace all species of personal property belonging to the party charged therewith on the tax books and no more specific description or designation thereof shall be necessary."

Acts 1899, p. 209.

Section 48:

"The assessor shall call upon each person required by this act to be assessed, and furnish him or her with the proper blanks for the purpose, and thereupon such person shall make to said assessor a full and complete description of all the personal property of which such person was the owner, * * * and such person shall also at the same time, make separate, full and true statements in like manner, in writing, distinctly setting forth in each a correct description of all the personal property held, possessed or controlled by him as executor, administrator, guardian, trustee, receiver, partner, agent, attorney, president or accounting

officer of a corporation, or consignee, pawn broker, or in any representative or fiduciary capacity. * * *"

Acts 1891, p. 210.

Section 50:

"Every person required by this act to make or deliver such statement or schedule shall set forth an account of the property held or owned by him as follows:

"PERSONAL PROPERTY—CREDITS.

"* * *.

"Second. All bonds, notes, mortgages, accounts, demands, claims and other indebtedness owing to such person, whether such indebtedness is owing from individuals, or from corporations, public or private, and whether such debtors reside within or without this State."

Acts 1891, p. 212.

Section 53:

"The schedule, * * * shall be in the following form, * * *:

"SCHEDULE.

Of all property held by ....., of ..... township, ... county, Ind., on the first day of April, 189..:

PERSONAL PROPERTY—CREDITS.

No.	Description of property.	Valuation by party.	Valuation by Assessor.
2.	All bonds	$.....	$.....
3.	All notes secured by mortgage	$.....	$.....
4.	All other notes.....	$.....	$.....

State of Indiana, ... County—ss:

"I, ..., being duly sworn, say to the best of my knowledge, information and belief the foregoing statement contains a true, full and complete list of all property held or belonging to me."

Acts 1891, p. 213.

From the above provisions of the statute it is apparent that the act in question points out notes and mortgages as being among the things to be taxed, and furnishes the means of assessing the same.

It is clearly contemplated that nonresidents of the State should be taxed upon all personal property within the State, as indicated by the fourth clause of Section 11, and that where a nonresident dies owning property within the State the same shall be taxed, as provided for in the sixth subdivision of said section, and that personal property, whether the property of a nonresident or a resident, under the control of an agent, shall be assessed to such agent, as provided by the seventh clause of said section. That such property shall be listed by the person having its possession or control, and that the same shall be listed separately from his own, as provided by Sections 19 and 48. That the term "personal property" shall include all goods

and chattels, and all indebtedness, as provided by Sections 4 and 44.

The act provides, as we have seen, the form of schedule, and in this schedule all bonds, notes, mortgages, accounts, demands, claims and other indebtedness owing such person are required to be returned without regard to the place of the domicile of the owner. It is also to be noted that ownership of the property is not essential to its assessment. Throughout the statute we have the words "held or owned"; "held or belonging"; "held, possessed or controlled," and "person having control thereof." The evident purpose and intent of the statute being to include all property within the State, both real and personal, and whether in the hands of the owner or in the hands of an agent, and whether owned by an inhabitant of the State or a nonresident thereof. We do not understand what further provision could have been made by the Legislature for the assessment of the class of property in issue in this cause than has been made by the several sections of the Act of 1891 when taken together. Notes and mortgages are chattels within the meaning of said act. The word "indebtedness" as used in Section 4 of said act, does not include the evidences of indebtedness, such as notes, bonds, mortgages, etc. A note or a mortgage is a chattel. It is a thing distinct, separate and apart from the intangible debt it evidences and represents. It has concrete form as much as a horse, a sheep or a cow. It can be replevied and levied upon or attached. It is the subject of manual handling, can be possessed and passed from hand to hand.

It will be seen that the act of 1891 includes notes and mortgages whether owned by residents or nonresidents, if within the jurisdiction of the State, in the schedule required to be returned by the taxpayer.

The Supreme Court of the State of Indiana has construed this statute and has held it to include such property.

Senour v. Ruth, 140 Ind. at 320;
Buck v. Miller, 147 Ind. at 589;
Buck v. Beach, Case at Bar.

We quote from opinion of the court in the case at bar, as follows:

> "As applied to this State it may be said that where it appears that the proper situs of property is here, the effect of our constitutional provision relative to taxation (Sec. 1, Art. 10), is to create a presumption of a legislative purpose to tax. As an aid therefore to the construction of the acts of 1881 and of 1891, we look to the question as to whether the appropriate State for the taxing of said notes was New York, Ohio or Indiana. * * *
>
> "In view of all the circumstances surrounding the keeping of said notes in Indiana, and of the purpose in so doing, it is not only our opinion that the situs of said notes was within the governmental subdivision on behalf of which appellee acted, but also that so far from straining against a construction of the enactments from which the authority to assess must be derived, if it exists, we ought rather to give weight to the presumption that the General Assembly has done its plain duty in the premises, by providing for the assessment of the property.

"Section 6271, R. S. 1881, provided: 'All real property within this State, all personal property owned by persons residing in this State (whether it is in or out of this State), and all personal property within this State owned by persons not residing in this State, subject to the exceptions hereinafter stated, shall be subject to taxation.' Section 6273, supra, provided that 'the terms *personal estate* and *personal property,* as used in this act, shall be construed to include * * * (among other things) all rights, credits and choses in action.' Provision was made for agents listing property. §§6297, 6330, supra. The schedule of said act was sufficiently broad to cover property which could not be listed as money loaned. See items 81 and 82; §6336, supra.

"Turning now to the act of 1891, we find that §8410, Burns, 1901, provides that 'all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation.' Provision is made in said act for agents listing property. §§8429, 8458, supra. It is also provided that 'personal property of nonresidents of the State shall be assessed to the owner or to the person having control thereof in the township, town or city where the same may be, except that where such property is in transit to some place within the State, it shall be assessed in such place.' §8421, supra. All notes are required to be valued in the schedule (§8460, supra), and that instrument must be attested by an oath that it 'contains a true, full and complete list of all property held or belonging to' the person making the same. §8463, supra. See 8676, supra, provides as follows: 'The

State Board of Tax Commissioners is hereby authorized to prepare for the use of assessors a more complete and perfect form of *schedule of property* than that set out in §53 of this act, with a view of securing a full assessment of all the property of the State.' Counsel for appellant contend that §8410, supra, is limited in its operation by the section which follows it. Segregating these two sections from the balance of the act, the contention mentioned might seem plausible, but the whole act must be read together, and, especially in view of the section last quoted, we are constrained to the conclusion that it was not the purpose in the enactment of §8411 to give a particular enumeration of all of the kinds of property which the act subjects to taxation.

"Referring now to both acts, we are of opinion that each is broad enough, the situs of the notes being within the State, to warrant the holding that said notes were subject to taxation here, and reading said acts in the light of the constitutional requirement above referred to we deem it clear that the construction indicated is proper. Indeed, it is our opinion that as to any property having a definite and established situs within the State, the onus is on the person objecting to its assessment to point out some reason compelling the conclusion that the legislature has not subjected the property to taxation."

It has been frequently held that the construction given the statute of a State by its highest court, will be adopted by this Court.

Stockard v. Morgan, 185 U. S. at 30;

Williams v. Parker, 188 U. S. at 504;
Williams v. Eggleston, 170 U. S. at 311;
Board of Liquidation v. Louisiana, 179 U. S. at 638;
Yazoo & Mississippi Valley R. R. Co. v. Adams, 181 U. S. at 583.

Where the interpretation of a local statute involves no federal question, this Court will accept the interpretation given it by the Supreme Court of the State.

Mead v. Portland, 200 U. S. at 164.

This Court has refused to interfere with the conclusion expressed by the highest court of the State that under the provisions of the State Constitution, a tax is uniform when it is equal upon all persons belonging to a prescribed class upon which it is imposed.

Armour Packing Company v. Lacy, 200 U. S. at 234.

Where a State court held that an act of its State legislature did not violate the State Constitution, this Court declared its decision not subject to review.

Armour Packing Company v. Lacy, 200 U. S., at 236.

In that case His Honor, Chief Justice Fuller, speaking for the court, said:

"With that conclusion it is not our province, nor are we disposed, to interfere."

In another case, Mr. Justice Holmes aptly said:

> "Matters of State procedure and the correctness of a New York decree or judgment, apart from specific constitutional objections, are not open here."
>
> Blackstone v. Miller, 188 U. S., at 207.

This, we submit, is an adequate answer that the State court "judicially amended" the statute or held as taxable property that which the statute purposely obliterated from the list of taxable things in Indiana, or that it acted beyond its lawful powers, or that its action presents a proper subject of review by this Court, and the statutes of the State and the decisions of its courts, clearly disclose that the taxation of the property in issue has not been made without due process of law.

We think it equally clear that neither the statutes of the State nor the decision of the State court in the case at bar, have denied to the plaintiff in error, or to his testator, the equal protection of the laws, or have given a citizen of Indiana an immunity from taxation denied to a citizen of the State of New York.

The contention of counsel for plaintiff in error is based upon the exception in Section 4 of the Tax Act of 1891, exempting from taxation the property belonging to inhabitants of Indiana actually and permanently invested in business in another State. They argue that the loaning of Nash's money in Cincinnati, by his agent, and the collection and reloaning of it constituted a real and permanent investment of Nash's property and money in business

in Ohio and that their situs for taxation was in the State of Ohio. They ignore the fact, however, that the Ohio notes were not in the State of Ohio; that the State of Ohio was not the domicile of the owner of the notes; that neither the notes themselves nor their owner were within the jurisdiction of Ohio; that they were not liable to taxation under such circumstances in Ohio; that they were purposely separated from the Ohio business by their owner and a situs given them in the State of Indiana for the purpose of avoiding liability for taxation in Ohio; that they were never removed from their Indiana location.

The State Supreme Court, in the case at bar, said:

> "As an aid therefore to the construction of the acts of 1881 and of 1891, we look to the question as to whether the appropriate State for the taxing of said notes was New York, Ohio or Indiana.
>
> "As to the first named State, it would appear that if the notes and the agency had been united in another State, the doctrine laid down by the New York Court of Appeals would have relieved the owner of liability to pay a tax on the notes in New York, provided, of course, that the statute remained as it was. In view of the abiding character of the Ohio agency and of its nature and extent, and of the fact that the notes were kept in this State in the hands of an agent, as a part of said business, and in the office of the decedent, it cannot be held that the owner did not separate the notes from his domicile, so far as concerns protection of the property, the most potent element in

natural justice on which taxation can be based, it appears that New York can not assert that reason for exacting a tax. Indeed, it could not reach the property, but only its owner; a power that ought to be the first to yield.

"As to the State of Ohio, it is first to be considered that the mere fact that it was the State where the debts existed did not authorize it to tax the investments: State Tax on Foreign Held Bonds, 15 Wall. 390; Senour v. Ruth, 140 Ind. 318. In the Federal case above cited it was said: 'Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors and only possess value in the hands of the creditor. With them they are property and in their hands they may be taxed. To call debts the property of debtors is simply to misuse terms.' Since the above case was decided, the same court held in Savings Society v. Multnomah Co., 169 U. S. 421, that for the purposes of taxation it is competent for the State to tax the interest of a mortgagee of real property at the place where the land is situated, relieving the owner of the land pro tanto, but that the case proceeded on the theory that as a mortgage is a defeasible conveyance of the fee, it is therefore competent to tax such interest. Doubtless it would have been within the authority of the State of Ohio to have established an excise tax upon the permanent business of loaning money in the State. It may be possible that as to moneys which have been made permanently a part of the capital of

the State it would have been competent to have enacted a law requiring agents in such circumstances to return such capital, on behalf of the owner, as moneys loaned, although we have not found any case which goes that far. Whether any such exceptional enactment exists in the State of Ohio, we are not informed, and it is really immaterial as to what the fact is in such particular, for it will be perceived that neither of such forms of taxation would tax either the note or the credit. In the enforcement of its revenue system this State can not defer to any possible law which might be upon the statute books of another State indirectly subjecting the same property to taxation. Our chief concern in entering on the inquiry as to whether the decedent was subject to taxation on his property in Ohio was to guard against a holding that the notes were taxable here (assuming that such construction were admissible), if upon well established principles concerning notes obtaining a business situs it was evident that holding such property liable here would result in double taxation. All of the cases involving business situs that we have examined are cases where the notes were in the hands of the agent. Indeed, under any ordinary statute, merely authorizing the taxation of property in the possession of an agent, we do not perceive how he could be assessed except upon the notes. If the latter had a situs elsewhere, it would result that in such circumstances the investment would escape taxation. See People v. Davis, 112 Ill. 272. We shall therefore look to the question as to the situs of the notes.

"The evidence in this case warranted the conclusion that the agent in Ohio had no general right of possession which would have enabled him to recall the notes at any time; that his right of possession was limited to the times when the principal or interest was due and to assessment days in Indiana. It is to be recollected that whatever measure of possessory right the Indiana agent had over the notes was in necessary diminution of the possession which might be lawfully had of them by the agent in Ohio. It appears that the possession of the notes in Indiana was the substantial one, while that in Ohio was never more than ephemeral and in some instances merely fugitive. Such possession as the Ohio agent had, assuming that he had no general right of control, was not sufficient to establish the situs of the notes there, as between that State and the one where they may be practically said to have been kept, and where an essential part of the business of the agency, as it was actually constituted, was carried on.

"If it satisfactorily appears that neither New York nor Ohio was the proper place for the assessment of said notes, then it must needs be that the appropriate situs for their taxation was in this State.

"Indiana has just grounds on which to claim the situs of said notes. It was the only State in which they were generally kept; they were kept in the hands of an agent here, in the office of decedent, in connection with a business that, however limited as applied to this State, was of a permanent character, and a component part of an entire business sufficiently broad to give such notes

a situs other than the domicile of the owner. The additional elements of a power over the paper to surrender it upon payment and to reinvest the proceeds, serve to mark more plainly a business situs, but in this case, where a single business had, for the purpose of transacting it, been split up between two States, we think that the State which not only furnished protection, but which had within it, practically at all times, the concrete evidences of the indebtedness, that alone, so far as the credit was concerned, was subject to taxation, may be treated as the proper situs for the assessment of such paper. This is not a case of notes sent into the State by their owner for safe keeping and clerical convenience merely. The business done by Buck concerning said notes would have clearly been a part of the Ohio business, had it been done in Ohio, but as Buck's duties relative to said notes were transacted in Indiana, as they were required to be, such duties, while attached to the same business, were really a part of an interstate business. That business, as before stated, was of such a character as to localize said notes for the purpose of taxation, and the court is therefore called upon to determine the situs of the notes pertaining to the business as between the States in which the business was transacted.

"We regard the proper situs of the paper as the place where it was located in fact. The theory of appellant's counsel that notes of a nonresident are only taxable in the event that they represent business done in the State is fallacious. The assessment is in this instance based on the paper representatives of credits; on the theory that the

concrete evidence of a credit, which may be seen, handled and replevied, which is protected by the law, and which so far represents the demand that a mere delivery of it may carry an equitable right to receive the benefit of the promise may appropriately be subjected to assessment in the State where it is kept, provided that the circumstances of the keeping are such as to separate it from the domicile of its owner. If this be the correct theory, the State in which the note is not kept, and not protected, where it can not be seen, handled or replevied, or subjected to manual delivery, is not the State which may most appropriately tax the note.

"There can be nothing in the theory that the State where the note is payable continues to protect it, though absent, by holding out a remedy for its ultimate enforcement, for constitutional provision has placed it beyond the power of the State to impair the contract. Neither can it be held that the State where the note is given may tax it on the theory that it is the place of its business nativity, for this would enable the State to tax notes executed in the State, not connected with any business agency, and in the hands of nonresident principals—a proposition which all of the authorities deny.

"Furthermore, as it was decedent's purpose to avoid localizing said notes in Ohio, by keeping them in this State, the intent must be imputed to him to establish a situs for that portion of his wealth here, and in a case where the tangible evidences of a man's investments are kept here permanently, in the hands of an agent, to escape tax-

ation elsewhere, we perceive no reason why it would be unjust to him to hold that his paper was within the State.

"In view of all the circumstances surrounding the keeping of said notes in Indiana, and of the purpose in so doing, it is not only our opinion that the situs of said notes was within the governmental subdivision on behalf of which appellee acted, but also that so far from straining against a construction of the enactments from which the authority to assess must be derived, if it exists, we ought rather to give weight to the presumption that the General Assembly has done its plain duty in the premises, by providing for the assessment of the property. * * *

"Appellant's counsel further contend that the act of 1891 would be invalid as discriminating against nonresidents, if it were held that provision had been made by said act for the assessment of notes held as these notes were, since Section 4 of said act (§8411 Burns 1901) contains an exemption in favor of residents, by the provision that for the purposes of taxation personal property shall be held to include 'all goods, chattels and effects belonging to inhabitants of this State situate without this State, except property actually and permanently invested in business in another State, shall not be included.' This provision was not designed to give an advantage to residents of this State by way of avoiding taxation, but it merely represents an act of comity, by which this State yields in a measure its taxing power over the owner, to avoid double taxation, in a class of cases where in all probability the other State is

taxing the business or the property invested therein. To give appellant a standing to complain, assuming that said section could in any circumstances offend against the provisions on which his counsel rely, it occurs to us that he ought to show that his decedent's property was liable to taxation elsewhere. But it is not because the owner of said notes was a nonresident that our minds incline to the conclusion that the notes were subject to assessment in Indiana, but because the notes had a situs here. How our statute thus construed could be held to be discriminative as against a nonresident we are at a loss to understand. This State has merely created an exemption in favor of its own citizens from the burdens of taxation here on a class of property having its permanent situs elsewhere. Just such an exemption, we are led to infer, was created in favor of decedent and those in like situation by the laws of the State of New York. In other words, by said section this State has released its citizens from a burden at home based on the theory that they would be subjected to taxation elsewhere, and the same right which we recognize as existing in another State to tax the property of our citizens if it is permanently located therein is the right which this State asserts against nonresidents who establish the situs of their property here. This is not discrimination, but perfect fairness."

See also Pullman, etc., v. Commonwealth, 141 U. S. 18;

New Orleans v. Stemple, 175 U. S., 309;

Savings Society v. Multnomah Company, 169 U. S. 421;

Comptoir, etc., Company v. Board, 27 So. R., at 905;
Blackstone v. Miller, 188 U. S., at 207.

Neither the statute nor the decision of the court imposed a burden on the plaintiff in error, or upon his testator, that is not borne by every citizen of the State of Indiana who holds like property. If a citizen of the State of Indiana had owned these notes taken by an agent in Ohio, doing business for him, precisely as these notes were taken by Nash's Ohio agent, and he had brought them out of the State of Ohio into Indiana, separating them from the Ohio business as Mr. Nash separated them, for the purpose of avoiding taxation on them in Ohio, and had kept them permanently in the office in the State of Indiana where he lived, and in his own possession except on the first day of April, and had, prior to said first day of April, sent them out of the State, as Nash sent them out of the State, for the purpose of evading taxation in Indiana, and had them returned a day or two after the first day of April in the original package, unbroken, as Nash had them returned, it is certainly clear that they would be taxable. If this is true, then how can it be said that a burden is placed upon the plaintiff in error or upon his testator, that under like circumstances is not borne by a citizen of Indiana, or how can it be said that an immunity from taxation is afforded a citizen of Indiana that is denied the plaintiff in error or his testator, as a citizen of New York?

Counsel have argued at length that notes and mort-

gages being only evidences of debt, are of themselves intangible property, without value, and untaxable. That, however, is not the law.

PROMISSORY NOTES AND MORTGAGES ARE TANGIBLE PROPERTY.

Bank bills, municipal bonds, promissory notes and real estate mortgages have such a concrete form that they are subject to taxation where found irrespective of the domicile of the owner. If such evidences of indebtedness are kept for an indefinite period, and are given a permanent location within the limits of the State, they are subject to taxation.

This principle is applied to goods and chattels, such as horses, cattle, sheep, hogs, grain and all tangible property other than bonds, notes and mortgages in all States, we believe, without an exception.

That this is true in our State we have already seen by the decisions in the cases hereinbefore cited.

Powell v. City, 21 Ind. at 340;
Rieman v. Shepard, 27 Ind. 289;
Standard Oil Co. v. Combs, 96 Ind. at 183;
Board v. Standard Oil Co. 103 Ind. at 304.

In the case of Gallup v. Schmidt, 154 Ind. at 203, it is said:

> "The right to tax property is a sovereign right reserved to the jurisdiction charged with the duty of its protection; and the authority of a taxing district to require all classes of property sheltered

by it to pay their ratable proportion of the expense of maintaining the government is unaffected by the residence of the owner.

"The Legislature has plenary power to create a tax for public revenue against all property located in the State."

In a recent Texas case it was urged that certain cattle sought to be assessed had not acquired a situs in Texas; that they were there only temporarily and were in fact only in transit to Chicago under a through bill of lading. The court said:

"We are not inclined to hold that cattle in Texas, while being fattened in the owner's pens for the outside markets, are too transient to have a situs and be taxable here. * * * If the owner may be allowed ninety days for feeding why may he not be allowed six months or a year or two years for grazing? In both cases the cattle may be said, figuratively speaking, to be on their way to Chicago or other market, their ultimate destination, but not in the sense of interstate commerce or of the tax laws."

Waggoner v. Whaley, 50 S. W. R. (Tex.) at 154.

In a recent Iowa case the property under consideration was cattle brought into Iowa in December for feeding purposes and only kept there until the following April. They belonged to a nonresident. The Supreme Court of Iowa held them taxable.

Fennell v. Pauley, 83 N. W. R. (Iowa) at 799.

The exact question presented by counsel has been decided squarely against them, in the case of People v. Board, 48 N. Y. 390.

There the property sought to be assessed, as heretofore shown, was a contract for the sale of lands. It was owned by a nonresident. It was kept in New York in the hands of an agent. It was not used in business, but it was physically present within the State and was being kept there indefinitely.

In re Romaine Estate, supra, the property in issue was certain securities consisting of stocks and bonds of different corporations and a mortgage upon real estate in New York City as well as several passbooks showing deposits by him in various savings banks in the same place, to a considerable amount. The owner for ten years prior to his death had been a citizen of and domiciled in the State of Virginia. The securities in issue at the time of his death and for three years prior thereto were kept in a box in a safe deposit company in the city of New York of which the decedent was the lessee.

The court held the property taxable, and in passing upon the question said:

> "Where, however, the money of a nonresident is invested in this State, as it was by Mr. Romaine in the bond and mortgage in question and in the deposits made by him in the savings banks, or where the property of a nonresident is habitually kept even for safety in this State, we think that the statute applies both in letter and in spirit. Such property is within this State in every reason-

> able sense, receives the protection of its laws and has every advantage from the government for the support of which taxes are laid, that it would have if it belonged to a resident."
>
> In re Romaine Estate, 127 N. Y. at 88.

This decision seems to us to make absolute and conclusive answer to the theory of counsel. It is right upon principle and has become the settled law in the State of New York.

In another and a later case one Augustus Whiting was a resident of and domiciled in Rhode Island, where he died. At the time of his death he had money on deposit in a bank at New York and owned certain bonds and certificates of stock that were found in a box rented by him in a safe deposit vault in New York. All these securities were physically present in that State and all were held to be subject to the tax provided for in the Collateral Inheritance Laws of that State, except the United States bonds.

Vann, J., speaking for the court, said:

> "The theory upon which the Supreme Court by a divided vote, proceeded to judgment, was that the written instruments were physically within the State and constituted property here subject to taxation. They were regarded as tangible and apparently as in the nature of chattels. I think this is a sound conclusion. * * * The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They are sold in the market, transferred as collateral security to loans, and are

> used in various ways as property. They pass by delivery from hand to hand, are subject to larceny and are taxable generally when in the possession of an agent in this State. They are the only evidence of transfer required by corporations issuing them in order to make actual transfer on the books. There is obvious propriety in subjecting the instrument of transfer to a personal tax when it is left in this state for safe keeping. It is subject to the jurisdiction of our laws, and hence is within the intent of the personal tax act."
>
> In re Whiting Estate, 150 N. Y. at 29, 30.

Every word of the reasoning of the learned Judge from whom we have quoted in reference to certificates of stock is applicable to promissory notes and mortgages. Such reasoning clearly and conclusively supports our contention that promissory notes and real estate mortgages have such a concrete form that they are subject to taxation where found irrespective of the domicile of the owner. And that where such evidences of indebtedness are kept for an indefinite period and are given a permanent location within the limits of the State they are subject to taxation.

In another case certain bonds of foreign corporations, both registered and coupon, owned by a nonresident, were habitually kept by him in a safe deposit vault in New York. The owner died. The bonds were held subject to taxation under the Inheritance Tax Act of New York. The decision was rested upon the decision in the Whiting Estate without discussion.

In re Morgan Estate, 150 N. Y. at 35.

In another case decided by the same court it is said:

> "The right in question is property, because it is capable of being owned and transferred. It is within this State, because the owner must come here to get it. It is subject to taxation because it is under the control of our laws. It has a money value, because it is virtually money, or can be converted into money upon demand."
>
> In re Houdayer Estate, 150 N. Y. at 41.

So in the case at bar the notes and mortgages were property because they were capable of being owned and transferred. They were within this State. The owner must come to Indiana to get them. They were here. They were under the control of our laws. They had money value.

In another case, speaking of bonds placed by an insurance company with the State tax commissioner of Ohio, pursuant to the insurance laws of that State, it was said:

> "There can be no doubt, therefore, that they are property within the State, and that it is within the power of the General Assembly of Ohio to tax them in the same manner as the employed stock of domestic insurance companies is taxed."
>
> Western, etc., Co. v. Halliday, 110 Fed. at 264.

In the case of Black Hawk Company v. Dorris, supra, notes and mortgages belonging to a deceased citizen of another State were retained in Iowa by an ancillary administrator wrongfully appointed, but the court held the

property to be taxable. It was urged in behalf of the estate that upon the death of the owner and the termination of the agency in Iowa the funds in the hands of such agents were no longer held for investment and therefore ceased to be taxable there. The court said:

> "While the agency then ceased, the property remained here subject to local administration, demanding the attention and the protection of the courts; and in our judgment, until such administration was complete, and the proper order entered for the transfer of the funds to the nonresident executor, the right of taxation in this State continued. The fact, if it be a fact, that the appointment of W. W. Miller as executor was an error is entirely immaterial to the consideration of the question before us. Until that appointment was revoked he was the legal custodian of the assets of the estate within this jurisdiction, and for the time being the legal title was also in him."
>
> Black Hawk Co. v. Dorris, 90 N. W. R. (Ia.) at 91.

In another case, speaking of notes and mortgages, the court said:

> "The real question is whether at the time personal property is subject to taxation it is in the State, in the hands of an agent, who retains its possession, and deals with it here in his representative character for his principal; and this whether the owner is solvent or insolvent; whether new loans are made or the business is in fact being

closed up with the intent to remove from the State as soon as it is convenient to do so."

Arosin v. London Co., 83 N. W. R. (Minn.) at 340.

This Court, speaking upon this question, said, citing the case of the City of Orleans v. Stemple, supra:

"The syllabus of that decision declares that 'notes and mortgages, the owner of which is domiciled in another State, but they are kept within the State by an agent, may be subjected to taxation by the law of the State in which they are held.' A non-negotiable note is certainly sufficiently concrete in form to be made an object of taxation. The fact that it may be less valuable in fact than it appears on its face may affect the estimate to be placed upon it for assessment purposes. But that question is something other than the question of its being a proper object of taxation. If a person domiciled abroad were to die leaving non-negotiable notes in this State in the hands of an agent, the presence of these notes in Louisiana would authorize the opening of the Succession in Louisiana for the protection of Louisiana creditors. We think the State has as much legal right to subject them, being here, to the payment of the contribution which it justly claims from all parties receiving the protection and benefit of its laws, who operate their property here for their individual gain and benefit as any creditor hereof."

Comptoir v. Board, 27 So. R. (La.) at 805.

Again it is said:

> "It is well settled that the situs of all property—whether tangible or intangible—is, for taxable purposes, the subject of statutory regulation and control."
>
> Armour Co. v. Mayor, 41 S. E. R. (Ga.) at 238.

The proposition for which we are now contending has the sanction of this Court.

In the Stemple case, hereinbefore cited, it said:

> "It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicile of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness.
>
> "Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible, personal property, yet they have such a concrete form that I can see no reason why a State may not declare that if found within its limits they shall be subject to taxation."
>
> New Orleans v. Stemple, 175 U. S. 309.

It seems to us that the above authorities, not only by the force they have as judicial decisions, but because of the reason and the principle upon which they are based, eminently justify the learned judge who tried this cause in the court below, in saying:

"It is undisputed that promissory notes are personal property within the meaning and purview of our statute on the subject of taxation. They are distinguishable in their character as property from the intangible credit which imparts value to them, and which is also personal property. Promissory notes are tangible. They can be seen. They can be handled. They are capable of separation from their owner just the same as other tangible property. They are capable of being in one State and their owner in another, or in a foreign land; and while it is true they are but evidences of debt, yet the law has clothed them with such qualities that they become articles of commerce, as much so as wheat or corn. They are subject to larceny. They may be replevied or they may be taken on execution to satisfy debt, and they are subject to destruction the same as other tangible property or thing. Not so the credit which they represent. That is intangible. It can not be seen, it can not be passed from hand to hand, it is indestructible. It is absolutely incapable of separation from the person of the creditor. These notes in question in this case might have been burned up, and they, as property, would have been destroyed, but not so the credit they stand for. The debt they evidenced would still have remained due and owing from the debtor to Job M. Nash."

Again, speaking of the decision of the Supreme Court of New York, found in the case of People v. Ogdensburg, 48 N. Y. 390, the trial court in the case at bar said:

> "There is no pretense or claim that these contracts were held for the purpose of collection and reloaning the money due thereon by the agent. They were in the hands of the agent precisely as they would have been in the hands of the owner, and held as the owner would have held them. And so of these Ohio notes in this case. They were in the hands of the agent as vice principal; it was a part of his business to care for them. He took the owner's place with reference to them. And for the court to hold that this plain declaration of the Legislature shall receive such limitations and restrictions as not to apply to property of this character which the owner has chosen to permanently keep in his permanent place of business in this State, would amount to judicial nullification of an undoubtedly constitutional enactment of the Legislature."

For this Court to hold that the Ohio notes in issue in this case are not within the meaning of the tax law of Indiana, would be as unreasonable and as extreme as it would have been for the Supreme Court in the Keeran case to have held that the notes in the hands of an attorney in this State for collection, though belonging to a nonresident, were taxable. It is the duty of the Court to give the written enactments of the General Assembly of the State reasonable and sensible construction.

In the case at bar the State Supreme Court aptly said:

> "We regard the proper situs of the paper as the place where it was located in fact. The theory of appellant's counsel that notes of a nonresident are

only taxable in the event that they represent business done in the State is fallacious. The assessment is in this instance based on the paper representatives of credits; on the theory that the concrete evidence of a credit, which may be seen, handled and replevied, which is protected by the law, and which so far represents the demand that a mere delivery of it may carry an equitable right to receive the benefit of the promise may appropriately be subjected to assessment in the State where it is kept, provided that the circumstances of the keeping are such as to separate it from the domicile of its owner. If this be the correct theory, the State in which the note is not kept, and not protected, where it can not be seen, handled or replevied, or subjected to manual delivery, is not the State which may most appropriately tax the note.

"There can be nothing in the theory that the State where the note is payable continues to protect it, though absent, by holding out a remedy for its ultimate enforcement, for constitutional provision has placed it beyond the power of the State to impair the contract. Neither can it be held that the State where the note is given may tax it on the theory that it is the place of its business nativity, for this would enable the State to tax notes executed in the State, not connected with any business agency, and in the hands of nonresident principals,—a proposition which all of the authorities deny."

It is said by counsel for the plaintiff in error that these notes have no value in and of themselves considered sep-

arate and apart from their ownership. That, however, is not the question here presented. These notes in the hands of the owner, or of his agent, to whom they are payable, and whose property they are, do have value. What that value is, is not a question for this Court, since there is no question of overvaluation in the record. Once we concede any substantial value, the question of valuation, as the record is presented to this Court, is one solely for the taxing authorities of the State of Indiana.

In a recent New York case, it was held that promissory notes owned by a nonresident and kept within the State of New York in the regular course of business until maturity for the convenience of the owner, were taxable.

People, etc., v. Wells, 77 N. E. at 20.

This case was decided March 13, 1906. In the course of the opinion the court said:

> "It was not denied that the notes were physically in the State of New York, and it was admitted upon the argument that both the notes and open accounts were held in New York until maturity, there collected, and after collection the proceeds remitted to Dublin. * * *
>
> "It is also settled that the situs for the purpose of taxation of promissory notes and similar instruments for the payment of money, where the 'debt is inseparable from the paper which declares and constitutes it,' is the place where it is actually and physically held.
>
> "Therefore, unless these notes were in course of transmission to the home office of the relator in

> Dublin, they were properly assessed. But they were not in transitu; they were held here until maturity for the convenience of the relator, and the proceeds in part then remitted. The case does not seem to differ in principle from one where a non-resident, equally for his convenience, deposits his securities with an agent within the State for custody and collection, and in such case it has been held that such notes and securities are subject to taxation in the State where they are on deposit. It is also to be observed that in the case before us the retention of the notes in this State was not casual or exceptional, but in accordance with the relator's regular and permanent course of business."

The reasoning of this case applied to the case at bar ends the contention of the plaintiff in error.

In a Louisiana case, decided in November, 1905, the same doctrine is announced.

As to the facts the court said:

> "Plaintiff has a business located in the city of New Orleans. That business is conducted through an agent, who converts the price due for property sold in form sufficiently concrete to represent the debt and to sue thereon, should he choose so to do. The agent puts the evidence of the credit into definite shape and holds it until it is collected. He deposits the cash therefrom in bank, and it is forwarded through the bank to the home company. In other words, the coal of plaintiff is sent here to be sold; it is retained to be sold; it is sold, and evidence satisfactory to the agent is

> taken as the representative of the price; and, when payment of this promise to pay is made, the amount thereof is deposited in bank, to be forwarded as before mentioned. The business, while here, is under the direction and control of the agent domiciled here. The promises to pay in question are taxable in the hands of, and owned by, residents, as tangible property."

We submit the facts in the above case are not essentially different from the facts in the case at bar. The promises to pay, taxed in the case at bar, were taxable in the hands of, and owned by, residents, the same as tangible property owned by them was taxable. The fact that they were owned by a nonresident does not change their situs, nor take them beyond the rule.

We quote further from the opinion of the court in the case last cited:

> "These promises to pay, taken in connection with plaintiff's business, were not to be considered as abstract right not at all removed from the domicile of the plaintiff. Whilst the cash in question was in bank, it was liable to assessment. It was equally as liable prior to its deposit, whilst represented by paper due to the local business. Receiving paper which the statute orders to be taxed brings it within the tax power. It was within the power of the lawmaking authority of the State to tax an indebtedness which has taken a concrete form. The written instrument evidencing the indebtedness is 'left within the State in the hands of an agent of the nonresident owner. * * *

> "Having concluded that the written acknowledgments were tangible and seizable, we are led to the further conclusion that, as such, they must bear their just proportion of taxes, as directed in the statute cited."

In another case, where a deposit made by a citizen of Illinois in a trust company in the State of New York remained there fourteen months, and the property was delayed within the jurisdiction of New York long enough to justify the finding of the State court that it was not in transitu in such a sense as to withdraw it from the power of the State, if it were otherwise taxable, it was held taxable, even though the depositor intended to withdraw the funds for investment; the court declaring in substance that under the laws of New York the deposit is subject to transfer tax, notwithstanding that the whole succession, including this deposit, had been taxed in Illinois.

Blackstone v. Miller, 188 U. S. at 204.

The court said:

> "Universal succession is the artificial continuance of the person of a deceased by an executor, heir or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. * * *
>
> "When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

"There is no conflict between our views and the point decided in the case reported under the name of State Tax on Foreign Held Bonds, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases."

TEMPORARY REMOVAL OF OHIO NOTES.

The Ohio notes were in the hands of the plaintiff in error on the first day of April for each of the years 1884, 1885 and 1886. Thereafter they were out of the State on the first day of April. They were sent out in bulk for the purpose of evading taxation; sent out that they might be out of the State on the first day of April. The act was simply a trick to avoid taxation in Indiana. Nash had been advised by the plaintiff in error that if they remained in Indiana on the first day of April, he would report them for assessment. He thereupon ordered them sent out of Indiana each year a day or two before the first day of April. They were returned within two to ten days thereafter. The purpose of sending them out of the State, in the light of the evidence in this cause, is so apparent that it does not admit of argument or discussion. It is urged by counsel for the plaintiff in error that because of this

trick the Ohio notes can not be assessed in Indiana for any of the years from 1887 to 1893, inclusive. There need be little said upon this proposition. The act was a fraud upon the State. It was intended to be such. It was but a part of the system adopted by Nash for the evasion of taxation. The State can not be deprived of its right to tax property permanently kept within its jurisdiction by the owner thereof because of the trick of such owner in removing the same temporarily out of the State for such purpose. If this could be done, the owner of tangible, personal property, living near the State line, could, on the last day of March, send his cattle and sheep, his horses and his hogs, across the line, and keep them there for the purpose of evading taxation until the second day of April, and then return them to their habitation within this State, thereby avoiding their assessment. The mere statement of the proposition carries with it its own refutation.

It has been well said:

> "The mere fact that the instrument has been sent out of the State for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial."

Dundee Co. v. School District, 19 Fed. R. at 368;

Savings Society v. Multnomah Co., 169 U. S. 421;

Connecticut Co. v. Town of Monroe, 52 Atl. R. at 942.

The Indiana Supreme Court, in passing upon this question, has said:

> "It may be true that in many cases, as for instance, if any engine owned by a person residing elsewhere should be sent into the city for repairs, or if a horse should be left by a farmer with a farrier in the city to be treated, a mere temporary possession by a person within the city would not be regarded as a possession within the meaning of the law on the subject of taxation."
>
> Powell v. State, 21 Ind. at 340.

If the above statement is a correct expression of the law, the converse of the proposition must be true, and the State can not be deprived of its right to tax property by the temporary and fraudulent removal of the property out of the State covering the first day of April, the taxing date.

In a Michigan case a conveyance of property was made to a nonresident for the purpose of evading taxes. The property was held to be taxable, the court saying:

> "It is apparent that this deed was a mere subterfuge and made for the purpose of escaping taxation, and the court under testimony of Mr. Loud should have directed the verdict for defendant as to all taxes, except on the Burrows & Rust and Mosher descriptions."
>
> H. M. Loud & Sons Lumber Co. v. Elmer Township, 123 Mich. 61.

In another case, a citizen of Nebraska invested money in government bonds a day or two before the taxing period

commenced, for the purpose of evading taxation, and within a few days thereafter converted the bonds into cash and redeposited them in the same bank. The court held that the taxing authorities could not be defeated by any such trick.

Jones v. Seward, 10 Neb. 154.

In another case money was taken out of a bank by the owner and a check taken payable to himself in legal tender treasury notes. The check was retained until the third day of March and then converted again into cash. Held that the money was properly taxed.

Mitchell v. Commonwealth, 9 Kan. 344.

This case was taken to this Court, and in confirming the decision of the State court the following language was used:

> "We think the decision in this case was correct. United States notes are exempt from municipal authority, but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as the plaintiff devised to escape his proportionate share of the burdens of taxation."

1st Otto, page 206.

Again, in a more recent case, it is said by this Court:

> "Where a person converts the entire amount of his bank account into treasury notes just before the day to which the assessment relates, for the sole purpose of avoiding the assessment, and a few days later surrenders the notes and has his account

restored, he cannot object to having the amount of his account assessed by the taxing officer."

Shotwell v. Moore, Co. Treas., 129 U. S. 596.

It is further said, in the case last cited:

"It does not need the finding of the court below as a fact to show that this was an evasion, and a discreditable one, of the taxing laws of the State, if it could be made successful. It is, therefore, urged that on this ground alone—the illegal purpose for which the transactions were made in the bank—the court should hold the plaintiff in error liable to taxation for the amount thus converted. Several decisions on this subject by State courts, holding this view, are cited in the brief of counsel. They are directly in point, and relate to attempts of precisely the same character to effect a similar evasion of taxation on property otherwise liable thereto."

After citing a number of cases the Court continues:

"From the latter case we quote the following language: 'If a taxpayer having a large amount of notes and mortgages, in order to escape the payment of taxes on the same, borrows a sum of money of a person residing out of the county, and deposits with his creditor such notes and mortgages, for the purpose of avoiding the payment of taxes on the same, such notes are taxable in the county where such taxpayer resides; and such deposit or transfer is a fraud on the revenues of the county.'

"And this court in Mitchell v. Commissioners of Leavenworth County, 91 U. S. 206, denounces conduct precisely similar to that of the plaintiff in error in this case in the following language:

" 'United States notes are exempt from taxation by or under state or municipal authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law.'

"The circumstances of that case are precisely like those in the case before us. The taxpayer converted, in the same manner as Shotwell did, about nineteen thousand dollars in current funds on general deposit in his bank into the same value in greenbacks, and placed them in a package which he put in the vault of the bank for safekeeping. This was on February 28. On March 3, following, he withdrew this package, and deposited the notes to his general credit. This was done for the sole purpose of escaping taxation upon his money on deposit in the bank. That case only differs from the one at bar in the fact that the revenue officer proceeded to collect the tax assessed by distress, which compelled the defendant to resort to a court of equity to enjoin the proceedings; but this Court held that the transaction was so inequitable that it would not be sustained in a court of chancery. * * *

"All these decisions show that the courts look upon this transaction as indefensible, and consider it an improper evasion of the duty of the citizen to

> pay his share of the taxes necessary to support the government which is justly due on his property."

Every word of censure contained in the foregoing opinion by this Court is applicable to the conduct of Job M. Nash, the testator of plaintiff in error.

The Supreme Court of Indiana has frequently held that taxes can not be evaded by converting taxable property into nontaxable property, when such conversion is made for the purpose of evading taxes. In fact every decision of the Supreme Court of Indiana on this question is in exact accord with the opinion of this Court in the case last cited.

> Ogden, Treas., v. Walker, 59 Ind. 460;
> Senour v. Matchett, 140 Ind. at 640;
> Crowder v. Riggs, 153 Ind. at 160.

THE OHIO NOTES HAD SUCH A BUSINESS SITUS AS TO MAKE THEM TAXABLE IN INDIANA.

We ask the Court to consider the authorities hereinafter cited in the light of our argument upon the "character of the situs" given these notes, found on page 39 of this brief, and in the light of the findings of the State courts upon the questions of fact involved in the case, found on page 43 of this brief.

As we have already shown, the Ohio notes were not kept by plaintiff in error in LaFayette for clerical convenience. They were there permanently. They had at no time any other permanent location. They were kept there continu-

ously, except for mere temporary purposes, and were held and controlled by Buck as the agent of Nash. They had a "business situs" in Indiana within the meaning of the law, and were held under such circumstances as to give them a taxable situs in Indiana. We have heretofore shown that the term "personal property," as used in the statute, includes bonds, notes, choses in action and other evidences of credits.

We have also shown that the situs of tangible, personal property, for the purpose of taxation, does not follow the domicile of the owner.

It has been held by the Supreme Court of Georgia, where a trading corporation has a fixed and permanent place of business within the State at which it regularly sells goods for cash and on account, that its property within the State, including its money and the solvent accounts due it in the course of such business, is taxable, although the chief office of the corporation is, by its charter, located in a State other than Georgia, and its principal place of business is situated in still another State of the Union.

> Armour Packing Co. v. Mayor, 41 S. E. R. at 237.

The court in the above case said:

> "In this case the property which is taxed was actually within the jurisdictional limits of the taxing power. It was here in Savannah when it was taxed by the authorities of Savannah. The legislature of Georgia has authorized the city of Savannah, in its charter, to pass such ordinances for the

purpose of taxation as the one upon which this levy is based. It seems, therefore, that this case falls within the rule that, for the purpose of taxation, personal property of nonresident owners, used by them in their business in this State, and received by them in carrying on their business in this State, is subject to taxation by the State. * * * We are aware that the Supreme Court of Mississippi, in the case of the City of Vicksburg v. Armour Packing Co., 24 So. 224, have held, under facts very similar to those in the case which we have under consideration, that certain notes and accounts due the Armour Packing Company in its business in Vicksburg did not have such a business situs in that city as made them subject to taxation by its municipal authorities; but Terrell, J., in delivering the opinion of the court admitted that there were authorities contrary to the view which that court entertained on the subject. Besides, it does not appear that the City of Vicksburg had, under its charter, the same authority to assess and levy taxes upon the particular character of property above referred to as that which has been conferred upon the municipal authorities of the city of Savannah."

In Indiana, it has been held, where the intention of the owner of the property was to keep the property within the State for a definite purpose and not to ship it until that purpose had been accomplished, that such property was within the protection of our laws and must bear its share of the public burdens, though such property while here was simply awaiting the execution of the purpose of the owner to send it out of the State.

Standard Oil Co. v. Combs, 96 Ind. at 183.

We suggest that the evidence in this case shows that the intention of Nash was to keep the Ohio notes in this State for a definite purpose, and that they were not to be removed for anything other than a temporary object until that purpose had been accomplished. Under such circumstances they were taxable.

In another Indiana case it is said:

> "When property is collected, even though it may be at the point of final shipment, to await indefinitely the owner's pleasure, or the rise of the markets, or to undergo a partial process of manufacture, or from any other cause having no relation to the preparation for, or facilities, or exigencies of transportation, such property will acquire an actual situs, rendering it subject to taxation."
>
> Board v. Standard Oil Co., 103 Ind. at 304.

Where hogs were purchased and packed preparatory to shipment, they were held to be liable to taxation.

> Powell v. State, 21 Ind. at 340;
> Rieman v. Shepard, 27 Ind. at 289.

The temporary purpose which in law takes property out of the rule that all property within the jurisdiction of the State is taxable is well illustrated by the following language from the decision in the Powell case, supra:

> "It may be true that in many cases as for instance, if any engine owned by a person residing elsewhere should be sent into the city for repairs, or if a horse should be left by a farmer with a farrier in the city to be treated, a mere temporary

> possession by a person within the city would not be regarded as a possession within the meaning of the law on the subject of taxation."

Wherever the element of permanency of location exists, property, if within the jurisdiction of the State, has always been held to be taxable.

It has been held that the personal property of a ward residing outside of a State, but which was in the possession and under the control of a guardian, who resided in such State, was liable to taxation by the State, though such property consisted of notes and bonds.

Tousey v. Bell, 23 Ind. at 426.

It has also been held that the funds of an insolvent mutual benefit assessment society in the hands of a receiver in this State are subject to taxation in the county where they are kept on deposit by such receiver, although the funds had been collected in other States in which the company also did business, and turned over to the Indiana receiver by orders of the respective courts, and were to be distributed to claimants, many of whom were nonresidents.

Schmidt v. Failey, 148 Ind. at 150.

In the above case the court, after quoting Clause 4, Section 11, of the Tax Law, declares that the receiver,

> "even if he were not, in law, the owner of the moneys so on deposit in bank to his credit as receiver, was, at least, the person having control thereof, and hence the one to whom such property should be assessed."

The Court will observe that this decision does not depend upon the ownership of the fund by the receiver. The property was declared to be taxable whether owned by him or not, and without regard to the residence of the actual owners of the trust, on the ground that it was physically present in the State of Indiana, and that it was properly taxed to him, because he was the person in control thereof. The rule of law for which we contend, and which authorizes the taxation of the evidences of debt, such as notes and mortgages, when permanently kept in the State under facts and circumstances such as those surrounding the notes and mortgages in issue in this cause, is sustained in the State of New York by a long line of decisions and without an exception.

The case of the People v. Board, 48 N. Y. 390, cited in the Keeran case, supra, is in absolute accord with our contention. One of the questions in that case submitted for the determination of the court was whether or not a contract for the sale of lands belonging to a nonresident in the hands of an agent who was a resident of the State of New York, was taxable. The court in the course of its opinion said:

> "Notes, bonds and other contracts for the payment of money have always been regarded as personal property and treated in the law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist where the obligation is held, where does it exist? It certainly does not

exist where the debtor may be and follow his person. And while, for some purposes in the law, by a legal fiction, it follows the person of the creditor and exists where he may be, yet it has been settled that for the purpose of taxation this legal fiction does not, to the full extent, apply, and that such property belonging to a nonresident creditor may be taxed in the place where the obligations are held by the agent."

People v. Board, 48 N. Y. at 390.

In a later case a resident of New York owned mortgages in the hands of his agents residing in Illinois, Minnesota and Wisconsin, who always retained the custody of them, received and invested the interest and upon payment of the principal discharged such security and reinvested the principal, and until so invested kept such funds in their own names without consulting the owner. The statute of New York at that time provided:

"All lands and all personal estate within this State shall be liable to taxation."

2 R. S. N. Y., 7th ed., page 981.

Under this statute it was held that such securities were not within the State of New York. That their actual situs was in the states where the agents resided and where the notes and securities were held.

People ex rel. Jefferson v. Smith, 88 N. Y. at 581.

The above case involved the taxation of the same securities that were taxed in Minnesota under the decision in the case of the Estate of Jefferson hereinafter referred to.

In a later case the New York court cites Jefferson v. Smith, supra, with approval, and adds:

> "The idea that personal property follows the situs or residence of the owner, while in some cases a perfectly proper legal fiction to be indulged in for purposes of justice, was held not to apply in such a case for the purpose of imposing a tax upon a security not within the State and not protected by our laws."
>
> People ex rel. Darrow v. Coleman, 119 N. Y. at 138.

The present tax law of New York provides:

> "All personal property situate or owned within the State is taxable, unless exempt from taxation by law."
>
> People v. Gaus, 61 N. Er. Rep. (N. Y.) 1989.

In the last case the court said:

> "The property in question is not exempt by law. It is situate within the State. It must be taxed there where it is situated, or where its holder or controller resides. It does not follow because Mr. McHarg does not reside in Albany that the property is not taxable there, for he can exercise his holding and control by means of his directions to his custodians in Albany. It follows that it must be taxable in Albany unless the forms and methods of taxation defeat the execution of the statute which declares it liable to taxation in that State."

It will be observed that the New York statute is similar to ours. It will also be observed that under that statute

and under the decisions of the New York court above cited the Ohio notes and mortgages owned by Nash were not taxable in New York so long as they were not physically present within that State. The Court will also observe under the decisions hereinbefore cited in Indiana, Ohio, New York and elsewhere the Ohio notes and mortgages were not taxable in Ohio because they were not physically present in that State and their owner was domiciled in the State of New York. Upon this question the New York cases we have just cited and our own case of Senour v. Ruth, 140 Ind. at 318, supra, are decisive. Either the thing sought to be assessed or the owner thereof must be within the jurisdiction of the sovereignty that seeks to levy the tax. That Job Nash knew this can not be doubted in the light of the facts and circumstances contained in the record in this cause, and that knowing it, he sent the Ohio notes and mortgages to Indiana for the purpose of evading their taxation, is equally apparent.

The facts and circumstances of the case at bar present a much stronger case than that presented by the facts and circumstances in the following New York cases:

In re Romaine Estate, 127 N. Y. at 88;
In re Whiting Estate, 150 N. Y. at 29;
In re Morgan Estate, 150 N. Y. at 35;
In re Houdayer Estate, 150, N. Y. at 37.

In the case of the Romaine Estate, supra, the same contention was urged in behalf of the taxpayer that is urged by counsel for plaintiff in error in the case at bar. The court said:

"The appellant further contends that the property in question was not 'within the State,' according to the true meaning of the statute, and the contention is supported by the argument that it would be unreasonable to tax money found upon the person of a nonresident who died while traveling in this State. We should hesitate before applying the statute to any property casually brought into the State for a temporary purpose, as a visitor or traveler, but the record before us does not present such a case. It might be well to hold that such property, although literally 'within the State,' was not here in the sense meant by the statute, on account of the transitory and accidental character of its presence and the immediate custody of the owner. (Herron v. Keeran, 59 Ind., 472, 476.) Where, however, the money of a nonresident is invested in this State as it was by Mr. Romaine in the bond and mortgage in question, and in the deposits made by him in the savings bank, or where the property of a nonresident is habitually kept, even for safety in this State, we think that the statute applies both in the letter and spirit. Such property is within this State in every reasonable sense, receives the protection of its laws and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident."

The court rendering the above decision is composed of jurists of conspicuous ability. Alton B. Parker was a member of it, and concurred in the opinion. From the above quotation it is apparent that the New York court was unable to read into the decision of the Keeran case the

rule of law contended for by counsel, and that that case, as understood by the New York court, is not in conflict with the rule of the law we insist upon. In the case of the Whiting Estate, supra, the taxability of notes, bonds and stocks belonging to a nonresident of the State was in issue. The court said:

> "The theory upon which the Supreme Court, by a divided vote, proceeded to judgment, was that the written instruments were physically within the State and constituted property here subject to taxation."

To the same effect is the opinion of the court in the case of the Morgan Estate, supra, and in the case of the Houdayer Estate, supra. In each of these cases the property sought to be assessed consisted of evidences of indebtedness on deposit belonging to a nonresident decedent and on deposit in the City of New York. They were wholly disassociated from business and the facts did not in any of them present nearly so strong a case as do the facts in the case at bar. In each of these cases the tax sustained was a special tax levied under the provisions of the collateral inheritance law of that State and the court itself admitted that such a law was to be much more strictly construed against the taxing authority than in a case involving the construction of a law which seeks the taxation of all property or of all persons within the State. The general law is construed liberally in behalf of the sovereign; the special law is construed liberally in behalf of the taxpayer.

Graham v. Russell, 152 Ind., at 191;
Reynolds v. Bowen, 138 Ind., at 441;

Hunter v. Woodward, 152 Ind., at 478;
Gallup v. Schmidt, 154 Ind., at 204.

The statute of Ohio requires foreign insurance companies to deposit negotiable bonds with the insurance commissioner of that State for the benefit of policy holders and creditors in the United States. Complying with this statute the Western Assurance Company, of Toronto, Canada, placed with the insurance commissioner of Ohio one hundred thousand dollars in bonds. These bonds were held to be taxable by the Circuit Court of the United States for the southern district of Ohio. The court said:

> "In 1867 the Legislature passed a law requiring foreign insurance companies to deposit with the Superintendent of Insurance for the benefit and security of policy holders, not less than one hundred thousand dollars in bonds, and when the complainant, in compliance with this law, deposited the bonds in question, that brought property into the State which is subject to taxation under the provisions of the law just quoted. * * * It is doubtless true that the taxation of these bonds may work a result not contemplated by the Legislature or by the taxing officers of the State, and in this case may, in a measure, impose double taxation upon the complainant, but the mandatory provisions of the Constitution and of Sec.2731 may not be disregarded."

We insist that when Nash left promissory notes and mortgages in the hands of his permanent agent in this State, there to be kept by him for an indefinite time, that

he sent property into the State which was subject to taxation.

The rule of law, that a nonresident who sends money into this State, and surrenders its possession and control to agents fully authorized to loan, invest and manage the same, thereby subjects such property to the jurisdiction of this State for the purpose of taxation, and that in such case the legal fiction that the situs of such property is at the domicile of the owner yields to the requirements of justice, and that the actual situs is the place where the property is actually situated and where such agent resides is sustained by many decisions.

Billinghurst v. Spaink Co., 58 N. W. (S. D.) at 275;

Hutchinson v. Board, 23 N. W. Rep. (Iowa) at 252;

Black Hawk v. Dorris, 90 N. W. (Iowa) at 90;

In re County v. Estate of Jefferson, 28 N. W. R. (Minn.) at 257;

Arosin v. London Co., 83 N. W. (Minn.) at 340;

Board v. Davenport, 40 Ills., at 200;

Goldgart v. People, 106 Ills., at 28;

Matzenbaugh v. People, 62 N. E. R. (Ills.), at 548;

Curtis v. Richland, 56 Mich., at 490;

Comptoir v. Board, 27 So. R. (La.) at 805;

Tappan v. Merchants' Bank, 19 Wallace, at 490;

Pullman's Co. v. Commonwealth, 141 U. S. 18;

Savings Society v. Multnomah Co., 169 U. S. 421;
New Orleans v. Stemple, 175 U. S. 309;
Bristol v. Washington, 177 U. S. 133.

In the Billinghurst case, supra, the court said:

> "We are disposed to hold that the situs of personal property owned by a nonresident, but employed in business in this State, and under the control and management of an agent, is at the residence of such agent for the purpose of taxation. * * * Where such property is under the management and control of an agent, it becomes the duty of such agent to list such property either in his own name or the name of his principal. * * * Plaintiff's money employed in Spaink County is protected by the laws of this State, and while it is so engaged she can not avoid the payment of taxes."

In Hutchinson v. Board, supra, it is said:

> "The property taxed is in the possession and under the control of the plaintiff. It is in fact in this State, within the meaning and intent of the statute; and can the courts by the invocation of a fiction defeat the plain meaning and intent of the general assembly? We think not; for it is the undoubted province of the general assembly to determine what property, actually within the State, is taxable, and unless the courts can say the law is unconstitutional or that it conflicts with some fundamental law that is universally recognized they are not only powerless, but it is their clear and undoubted duty to enforce the statute."

In the case of Black Hawk v. Dorris, supra, the court said:

> "We are not prepared to hold that moneys and credits of nonresidents, which are actually being kept or held in this State for purposes other than investment are under no circumstances subject to taxation here. The facts in this case, however, do not require any discussion of the general question thus suggested. The funds upon which this particular tax was levied were admittedly sent to this State for investment and were so being held by the agent at the death of the owner. They had been kept here for a period of over twenty years earning large profits. During all that time they had enjoyed the protection of the law of Iowa. * * * While the agency of W. W. Miller had ceased, the property remained here subject to local administration, demanding the attention and protection of the courts."

We suggest to your Honors that the property in issue in the case at bar remained in Indiana at the death of Job Nash subject to local administration, demanding the attention and protection of the courts. Since the bringing of this action, a local administrator has been appointed in Tippecanoe County and such administration is now pending.

In the case of In re County v. Estate of Jefferson, supra, the question of the assessment of the notes and mortgages in issue in the case of People ex rel. Jefferson v. Smith, 88 N. Y. at 581, supra, was involved. Evidently Smith had been imitating the example of Nash. He did not return these notes and mortgages for taxation in New York. An effort was made to tax them. The court

held they were not taxable in New York because they were not physically present within the State. He did not return them for taxation in the State of Minnesota, where they were held. After his death, the State of Minnesota sought to tax them and the Supreme Court of Minnesota sustained the tax. In the course of the opinion the court said:

> "In People v. Smith, 88 N. Y. 576, the New York court held these very credits not taxable in that State because they were not personal property within that State, but that they were within this State; that is, had a situs here."

In Arosin v. London Co., supra, it is said:

> "The real question is whether at the time personal property is subject to taxation it is in the State, in the hands of an agent, who retains its possession and deals with it here in his representative character for its principal; and this whether the owner is solvent or insolvent; whether new loans are made or the business is in fact being closed up with the intent to remove from the State as soon as it is convenient to do so."

The tax in the above case was sustained.

In the case of Matzenbaugh v. People, supra, the court said:

> "She, the daughter, was his agent and the court was amply justified in believing she had his notes and securities in her possession in Watseka, Illinois, for the purpose of enabling her to transact the business of collecting and loaning the money in Iroquois County for him. * * * Regardless of the insistence of the appellant that he had in good

> faith changed his domicile from Illinois to Texas the situs of his notes and securities which remained in the hands of his agent in Illinois for the purpose of enabling such agent to successfully and conveniently continue the prosecution of the business of loaning money, in which appellant had long been engaged, was not changed, but such notes and securities were subject to taxation under the provision of the laws of Illinois."

In the case of Curtis v. Richland, supra, the Supreme Court of Michigan said:

> "The courts of last resort in this State have uniformly held the fiction of law that personal estate has no situs away from the person or residence of the owner must yield to the fact of actual location, such being the intent of the taxing law."

In the case of Tappan v. Merchants' Bank, supra, this Court, speaking through Chief Justice Waite, declared:

> "Personal property, in the absence of any law to the contrary, follows the person of the owner and has its situs at his domicile. But for the purpose of taxation it may be separated from him and he may be taxed on its account at the place where it is actually located. These are familiar principles and have often been acted upon in this Court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly on him. If he is absent and it has jurisdiction of his property, it operates on him through his property. * * * It must be borne in mind that all this property, intangible though it may be,

> is within the State. That which belongs to non-residents is here by operation of law. That which belongs to residents is here by reason of their residence. All the owners have submitted themselves to the jurisdiction of the State and they must obey its will when kept within the limits of constitutional power."

In the case of Pullman Co. v. Commonwealth, supra, Mr. Justice Gray, speaking for this Court, said:

> "For purposes of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicile and even if he is not a citizen or resident of the State which imposes the tax."

In the case of Savings Society v. Multnomah Co., supra, it is said:

> "Personal property, as this Court has declared, again and again, may be taxed either at the domicile of the owner or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax."

In the above case, Mr. Justice Gray, speaking for the Court, referred to the Foreign Held Bond Case, 15 Wallace, 300, cited by counsel, and said of it:

> "It becomes important, therefore, to notice exactly what was there decided. In that case a railroad company, incorporated both in Ohio and in Pennsylvania, had issued bonds secured by a mortgage

> on its entire road in both States; and the tax imposed by the State of Pennsylvania, which was held by a majority of this court to be invalid, was a tax upon the interest due to the bondholders upon the bonds, and was not a tax upon the railroad, or upon the mortgage thereof, or upon the bondholders solely by reason of their interest in that mortgage. The remarks in the opinion, supported by quotations from opinions of the Supreme Court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and where held by a non-resident is as much beyond the jurisdiction of the State as the person of the owner, went beyond what was required for the decision of the case and can not be reconciled with other decisions of this Court and of the Supreme Court of Pennsylvania."

In the case of Bristol v. Washington, supra, Chief Justice Fuller, speaking for this Court, said:

> "Nevertheless the business of loaning money through the agent in Minnesota was continued during all these years just as it had been carried on before, and we agree with the Circuit Court that the fact the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney did not exempt these investments from taxation under the statute as expounded in the decisions to which we have referred. * * * Under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney, did not take these investments out of the rule."

In an earlier case it is said by this Court:

> "We take it to be a point settled beyond all contradiction or question that a state has jurisdiction of all persons and things within its territory, which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects and property."
>
> Coe v. Errol, 116 U. S. 517.

Under the title of "Indiana Cases" counsel for plaintiff in error cite a number of cases, none of which, we submit, supports their contention upon the questions involved in this case.

The Supreme Court of Indiana, in its decision in the case at bar, very aptly says of these cases:

> "We pass over without citation a number of early cases in Indiana wherein it was held that in the absence of any direction to the contrary the domicile of the owner of intangible personal property is the controlling factor as between different taxing corporations within the State. We do not regard such authorities as at all in point as applied to cases like the one in hand."
>
> Record, p. 1061.

In the case of New Albany v. Meekin, 3 Ind. 480, the situs of a steamboat owned by a resident of New Albany was involved. The court decided that the situs of the steamboat, for the purpose of taxation by a city, does not follow the domicile of the owner. We think this decision correct. The boat was not within the jurisdiction of the

city, and was not taxable, though its owner resided within such city. The boat had a situs of its own independent of the owner's domicile.

In the case of City, etc., v. Hall, 14 Ind. 27, the city of Evansville sought to tax shares of stock in an insurance company which had its principal place of business in that city, but which were owned and kept in the town of Princeton, in Gibson County, Indiana. The court decided that such shares of stock were not taxable in Evansville. The court was clearly right. Neither the thing sought to be assessed nor the owner thereof was within the jurisdiction of the city of Evansville.

In the case of City of Madison v. Whitney, 21 Ind. 261, City of Madison sought to assess bank stock owned and held by a nonresident of that city. The bank itself was located in the city, but neither the owner of the stock nor the stock itself was within the city. There is absolutely nothing in either of these cases that even tends to support the clerical convenience theory of counsel.

The next case cited and the one most relied on by counsel for the plaintiff in error, is that of Herron v. Keeran, 59 Ind. 472.

But that case is far afield from the case at bar, and if confined to the question actually before the court for decision and actually decided by the court, and considered in the light of the facts upon which the opinion is based, clearly fails to support the contention made. In that case certain promissory notes and other choses in action belonging to a nonresident in this State were in the hands of an

attorney in this State for *collection* simply, and certain municipal bonds were *temporarily* on deposit in a bank in this State, merely for safekeeping.

The court decided that the language of the statute included the property in question and expressly authorized the taxation of such property, but said:

> "The notes and accounts in the hands of the attorneys were left with them simply for collection, and the remission of the moneys collected to the owner in the state of his residence; and the bonds, on change of his residence were *temporarily* left for safekeeping not *permanently* to be used in the State. * * * It had not been left in this State to be invested by an agent here, with some degree of permanency in business."

The court so construed the statute as to exclude from its provisions the property in issue in that cause; that is, notes in the hands of an attorney for collection and bonds temporarily on deposit within the State. It is important to note the exact thing decided and the exact extent to which the literal meaning of the statute was modified. The language used by the court expressly confines the decision to the exact issue presented. Reference is made to certain decisions holding that notes and evidences of debt in the hands of an agent of the owner, who resides in another State or country, when such notes are taken for money loaned, and held for renewal or collection, with the view of reloaning the money by the agent in the same State, the business being permanently in the hands of the agent, are taxable, but expressly distinguished the case then before

them; that is, a case where such notes were temporarily in the hands of an attorney for collection or temporarily on deposit, from the class of cases referred to, and said:

> "It is not necessary, therefore, in the case before us, that we should express an opinion upon the correctness of the decisions holding that choses in action may, under certain circumstances, be taxed in a State other than that of the domicile of the owner."

The limit to which the exact and literal meaning of the language of the statute was modified is found in this language of the court:

> "But the statute can not be taken in its broadest sense. There must be a restriction, a limitation upon its literal meaning, by construction. Otherwise, bills, notes and bonds in the possession of a temporary visitor in the State, in fact those in possession of a traveler passing through it, might be taxable in it. They would be within the State, and are within the letter of the statute. But such could not have been the intention of the Legislature."

Beyond this the Court did not go in its limitation upon the literal meaning of the statute. The Court was perhaps right in the restriction placed upon the language of the statute, but it certainly went to the verge of its right to modify and change an enactment of the Legislature by judicial construction.

We submit the following, in reference to the Herron-Keeran case, from the opinion in the case at bar:

"In Herron v. Keeran, 59 Ind. 472, it was held that promissory notes and accounts placed in the hands of an attorney in Indiana for collection, and municipal bonds left temporarily with a bank in this State for safekeeping, belonging to a nonresident, were not liable to taxation here. This court there said that the choses in action involved were property within the State, and as such were within the letter of the taxation act, but as a matter of interpretation it should be held that the property was not within the State according to the sense in which the legislature had used those words. The court in that case distinguished between the case before it and the class of cases recognizing the possibility of notes obtaining a business situs where they are in the hands of an agent for collection, with a purpose to have him reloan the money, the business being permanent in his hands. Foresman v. Byrns, 68 Ind. 247, is not remotely in point upon the question here involved, so far as the matter before the court was concerned, but that case is relied on by counsel for appellant, since language was used in the opinion from which it is to be inferred that credits due to a nonresident are only to be taxed where a business situs has been established as the same was defined in the Herron case, supra. There was a mere statement of the proposition, and, as the question of business situs was not involved, it can not be presumed to have received the careful attention of the court. This mere inconsiderate obiter can not be held to have established a rule of construction that should be influential in the construction of the taxation acts which were subsequently passed. See National Supply Co. v.

Stranahan, 69 N. E. 447; Sulzer-Vogt, etc., Co. v. Rushville Water Co., 160 Ind. 202. Schmidt v. Failey, 148 Ind. 150, is a case which involved the liability of a receiver of a corporation to assessment for the purposes of taxation on moneys in bank in this State, it appearing that a considerable part of the fund deposited, belonging to creditors over the country, had been brought into the State by reason of the fact that courts in other States had appointed receivers over the same corporation, and had caused the funds sequestered by such orders to be turned over to the receiver in this State, for the purpose of having one administration. In deciding that the deposit was subject to taxation this court indicated that since the funds were protected by this State and one of its courts was administering the trust, it inclined to a construction of the act of 1891 which would render the property liable to contribute to the maintenance of government in this State. In Gallup v. Schmidt, 154 Ind. 196, it was said: 'The right to tax property is a sovereign right reserved to the jurisdiction charged with the duty of its protection; and the authority of a taxing district to require all classes of property sheltered by it to pay their ratable proportion of the expense of maintaining the government is unaffected by the residence of the owner.' "

Counsel for plaintiff in error now ask your Honors to take another and far more aggressive step in judicial legislation, and to further nullify the language of a solemn enactment of the General Assembly of the State of Indiana, by judicial opinion They ask you not only to declare that

notes and mortgages in the hands of attorneys for collection or temporarily on deposit in the State of Indiana are not within the statute; but to go further and hold that notes and mortgages of a nonresident in the hands of a resident agent, having charge of an active and long established brokerage business located in the State of Indiana; connected with, and a part of, such business transacted by such agent; permanently held, managed and controlled by him, with authority vested in him to negotiate, sell, assign and release of record any and all of them; so held and kept by said agent for the purpose of avoiding taxation in the State of the owner's domicile, in the State where they were executed and in the State where kept; where it was the agent's business to know when they became due, and to send them away for collection or renewal; and where they were never out of the State except for some temporary purpose; *though within the language of the statute are without its meaning.*

In the argument of counsel they ignore, and would have your Honors ignore, the temporary situs of the notes and securities in the Keeran case. They seek to treat the notes and mortgages in issue in this case as though their situs was similar to the situs of the securities in that case. The facts and circumstances of the two cases are entirely different. In that case the notes and securities had a most transient and temporary situs only. In the case at bar they had a permanent and continuing situs, and were never removed except for a transient and temporary purpose. The Keeran case is not an authority in the case at bar. It does

not hold that notes and mortgages in order to be taxable here must spring from a going business in this State, or that they must grow out of the loaning and reloaning of money in this State. No such issue was presented. No such decision was made. The court did not even attempt such a decision, but expressly declared that it was not necessary to decide that question.

The counsel are learned. They are possessed of wide knowledge and experience. Their researches in this case have been exhaustive. Yet they have failed to find a single case that establishes the rule of law contended for by them in the case at bar. True, they have cited many cases, but in every instance where notes and securities sought to be taxed were held to be nontaxable the situs of such securities was brief, transient and of the most temporary character.

It is due the defendant in error that these decisions be confined to the exact question presented to, and decided by, the court making the decision. Only such questions as were before the court for decision and such as were expressly or impliedly decided constitute the decision. The reasoning or illustrations of the court do not constitute decisions, and hence such reasoning and illustrations are not binding adjudications.

It is well said by the learned judge who tried the case at bar:

> "In the case of Herron v. Keeran the court was not called upon to decide whether or not it was essential to subject the notes of a nonresident to taxation in this State that they should be in the hands

> of an agent here for the purpose of collection or renewal, and with a view of reloaning the funds if collected. * * * Nor does any other decided case that has come under my observation so hold; while the very case cited by the court in Herron v. Keeran, supra, of People v. Ogdensburg, 48 N. Y. 390, upon a statute of similar import to our own, holds to the contrary."

The facts and circumstances in the record in this cause clearly and decisively distinguish it from the Keeran case, and before your Honors can exclude from taxation the notes and securities in issue, you must indeed go far in the nullification of the statute as enacted by the General Assembly, and yourselves enact legislation under the guise of judicial decision.

The case of Foresman v. Byrns, 68 Ind. 247, is also cited by counsel. There neither the securities nor the owner was within the State. Both the thing sought to be taxed and the owner thereof were without the jurisdiction of the State. The question arose upon a demurrer to the complaint and upon the question of the sufficiency of the evidence to sustain the finding of the trial court on a motion for a new trial. Under the facts alleged in the complaint Byrns was not at any time the agent of the owner of the securities. According to the averments, the money, upon the receipt of the securities, was deposited by the owner of such securities,

> "To the credit of the plaintiff, as agent for such borrower, in a bank in the city of New York. * * * In all business transactions engaged in

> by him, relating to loans of said * * * company, * * * he has never had in his possession or under his control, any of the money invested or loaned by said * * * company in the State of Indiana, nor has said * * * company ever paid, or agreed to pay, the plaintiff any compensation for making loans in Indiana, but said company in making its loans to borrowers in Indiana * * * kept and retained such moneys in its own possession and control in the city of New York until after the delivery to it of those bonds, mortgages and receipts of the borrowers."

The court expressly states:

> "The evidence sustains the allegations of the complaint."

Under that state of facts the court held the notes and mortgages nontaxable. The above presents the case decided by the court. It decided nothing further. There was nothing else before it for decision. Anything else said in the way of reasoning or illustration is beside the issues submitted to it, and is of no force or effect as an adjudication.

In the later case of Senour v. Ruth, 140 Ind. 318, cited by counsel, neither the notes, the subject of the attempted taxation, nor the owner thereof, were in the State; both were beyond the jurisdiction of the State. The court very properly held that authority for the taxation of such property is not given. It quotes Section 3 and the fourth subdivision of Section 11 of the Act of 1891, and says:

> "Expressly by the first of these provisions and impliedly by the second, the authority is given to tax property within the jurisdiction of the State."

It then decides (the property in issue and the owner thereof both being out of the State and beyond its jurisdiction) that such property is not taxable.

With that decision we have no quarrel. But that is not the case at bar. Here the notes and mortgages assessed were within the State. They were permanently located here and were continuously kept within the State's jurisdiction.

The case of Buck v. Miller, 147 Ind., at 595, is also cited, and it is claimed that it was there held that in order to be taxable in this State notes and mortgages of a nonresident must be kept and used in business in this State, and spring from such business. We have already shown that that question was not in issue and was not decided by the court. The exact point decided by the court in that case, as we have heretofore shown, was, in the language of the court:

> "If personal property is used in business in this State it ought to be assessed for taxes even though the owner may claim to be a citizen of and domiciled in another State; and that this must be true of moneys and credits as well as of other forms of personal property. * * * That a business may be done in buying and selling property, including bonds, stocks, notes and mortgages, and in making loans and investments, collecting and reloaning from year to year, and that if the moneys

> and securities so used are retained in this State, they should be subject to taxation here quite the same as any other kind of property."

The averments in the complaint then before the court showed that the notes and mortgages described therein were used as indicated in the opinion of the court just quoted, and the court decided that if they were so used they were taxable.

We also submit the following as to the case of Buck v. Miller, 147 Ind. 587, from the court's opinion in the case at bar:

> "We come now to the case of Buck v. Miller, 147 Ind. 587, which we mentioned in an earlier portion of this opinion. As indicated, the questions in that case were presented on demurrer to the complaint. There was so much of what was material left indefinite in that pleading that we hesitate to hold that the opinion is the law of the case in respect to the question as to whether said notes were taxable in this State. That opinion, however, is very much in point. Thus it was there said: 'For purposes of taxation, the term *personal property* includes bonds, notes, choses in action and other evidences of credits. * * * The test as to where the right to tax property exists is its place of location and use; the place where, if a security or obligation, it is a credit, not where it is a debit. It is quite immaterial whether the notes or other obligations were executed or were due by residents or nonresidents of the State. If they were owned,

held and used in Indiana, they were taxable here; and this, too, whether the business here in which they were used was conducted by Mr. Nash in person or by some one else for him. * * * The property is taxable where it is owned, held and used in business, and where it is protected by the laws of the community in which it is so held and used; and the circumstance that the owner, whether for honest or other motives, claims a residence elsewhere, is not controlling. It is, of course, quite different, as already many times said, where the property is temporarily in the State; as, for instance, where securities are sent into the State for collection, inspection and safekeeping, or the like.'

"It does not militate against the power of the State to tax personal property which has a definite and permanent situs therein that another State, by reason of its jurisdiction over the owner or otherwise, is also exercising a like power. Coe v. Errol, 116 U. S. 517; Boyer v. Jones, 14 Ind. 354; Judson on Taxation, Sec. 426; and see Davidson v. New Orleans, 96 U. S. 97, 106. As a matter of justice, however, the courts incline to a presumption that the taxing acts they are called on to construe were not intended to reach property which has its proper situs elsewhere, provided that the language of the statute does not lead to the opposite conclusion. But as applied to this State it may be said that where it appears that the proper situs of property is here, the effect of our constitutional provision relative to taxation (Sec. 1, Art. 10), is to create a presumption of a legislative purpose to tax. As

an aid therefore to the construction of the acts of 1881 and of 1891, we look to the question as to whether the appropriate State for the taxing of said notes was New York, Ohio or Indiana."

Respectfully submitted,

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September 20, 1906.